92-1856

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CITY OF LADUE, EDITH J. SPINK, MAYOR OF THE CITY OF LADUE, THOMAS R. REMINGTON, GEORGE L. HENSLEY, GALE S. JOHNSTON, JR., ROBERT A. WOOD, ROBERT D. MUDD, JOYCE T. MERRILL, AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF LADUE,
Petitioners,

v.

MARGARET P. GILLEO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously held, in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993), that the City of Ladue's sign ordinance is content-based in violation of the First Amendment because it allows limited exceptions to its prohibition of noncommercial and commercial signs, even though it is undisputed that the content-neutral legislative purpose of the exceptions and of the ordinance as a whole is to prohibit only those signs which, by their function or location, are most likely to proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

2. Whether, by relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which is in conflict with the reasoning of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993), the court of appeals mistakenly assumed that noncommercial speech deserves greater First Amendment protection than commercial speech and, as a result, erroneously held that the limited exceptions in the City of Ladue's sign ordinance favor commercial speech over noncommercial speech, rendering the ordinance unconstitutional.

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The City of Ladue, Edith J. Spink, Mayor of the City of Ladue, Thomas R. Remington, George L. Hensley, Gale S. Johnston, Jr., Robert A. Wood, Robert D. Mudd, Joyce T. Merrill, as members of the City Council of Ladue, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-8a) is reported at 986 F.2d 1180 (8th Cir. 1993). The opinions of the District Court (App. B, C, D, 11a-31a) are reported at 774 F. Supp. 1559-1568 (E.D. Mo. 1991).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1993, the date the court's opinion was filed. On May 4, 1993, the Eighth Circuit amended its opinion by substituting three new pages from its original opinion to correct technical errors. Neither party filed a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The City of Ladue's sign ordinance, passed on January 21, 1991, and amended on February 25, 1991, will be referred to as "New Chapter 35" or as the "sign ordinance" of the Code of the City of Ladue.[2] New

[1] References to "App." are to the Appendix to this petition. References to "Appendix" are to the portions of District Court Record that were filed as the Record on Appeal in the Eighth Circuit.

[2] On January 21, 1991, the City of Ladue (hereinafter "Ladue") repealed the then-existing Chapter 35 of the City Code relating to

Chapter 35 is reproduced in its entirety in Appendix F at 35a-50a.

STATEMENT

1. *Ladue's Sign Ordinance.* The question presented by this petition is whether the First Amendment permits the City of Ladue, a small and principally residential community, to protect the quality of life of its residents by prohibiting noncommercial and commercial signs that proliferate, cause visual blight, diminish the value of real estate, or create safety hazards.

Ladue's sign ordinance generally prohibits all signs[3] within Ladue. App. F at 40a. The ordinance, however, permits a limited number of noncommercial and commercial signs, "which either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interests in privacy, aesthetics, safety and maintenance of real estate values so as to necessitate a total ban of all signs." App. F at 38a. (Declaration of Findings, Policies, Interests, and Purposes that support Ladue's sign ordinance).

The limited number of exceptions to Ladue's prohibition of signs include:

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signs. The parties have referred to Ladue's predecessor sign ordinance as "Old Chapter 35."

[3] Ladue's sign ordinance extends the definition of "sign" to those items that have a tendency to proliferate such as a "banner," commonly understood to be an elongated rectangle, and a "pennant," commonly understood to be a rectangle tapered to a point. App. F at 39a. The ordinance, however, does not extend the definition of signs to a "flag," commonly understood to be rectangular or square shaped. Consequently, an American flag or the flag of any other nationality or organization is not prohibited under the ordinance.

This Court has held that an ordinance should be narrowly construed with deference being given to the city's construction of the meaning of the ordinance. *Frisby v. Schultz*, 487 U.S. 474, 481-82 (1988). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 799, 800 (1989).

> municipal signs, subdivision and residence identification signs, road signs and driveways signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, identification signs for not-for-profit organizations, signs identifying the location of public transportation stops, signs advertising the sale or rental of real property, commercial signs[4] in the commercially zoned districts (1% of the total acreage of Ladue) and the industrial zoned districts (2% of the total acreage of Ladue), and signs identifying safety hazards.

App. F at 40a-41a.

Ladue's sign ordinance does not favor the content of any particular viewpoint expressed through a sign. Political, non-political, controversial, and non-controversial signs are all prohibited under Ladue's ordinance. Signs "For Peace In The Persian Gulf" violate Ladue's ordinance as do signs that say, "Wage War In The Gulf—Kill Saddam Hussein." Signs that ask residents to "Vote for School Taxes" violate Ladue's ordinance as do signs that announce, "Celebrate Joe's Fortieth Birthday." In addition, most commercial and noncommercial signs are prohibited. One may not advertise a "Bake Sale" or "School Picnic" in residential neighborhoods, which compromise 84% of Ladue's total acreage. None of these signs are prohibited because of the content of their messages. All of these signs are prohibited because the proliferation of signs in Ladue and the resulting blight offends the City's significant interests in aesthetics, safety, and the protection of real estate values.

2. *Ladue's Comprehensive Commitment to Preserving The Natural Beauty Of its Community.* Ladue is a small and predominantly residential community, of which only limited areas have been zoned for commercial or industrial use. Appendix F at 35a. Malcolm C. Drummond, a pro-

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[4] Ladue interprets this exception to apply only to commercial signs that identify the commercial premises or that are related to activities conducted on the premises.

fessional city planner and national expert in the field of municipal zoning regulations and land use, and the Honorable Edith J. Spink, Mayor of the City of Ladue, prepared detailed affidavits describing Ladue's long-standing and comprehensive interests in maintaining aesthetic, privacy, safety, and real estate values. Appendix at 104 (Drummond Affidavit ("Aff.")). *See also* Appendix at 282 (Spink Aff).

Ladue has a unique and special heritage, with historical antecedents to settlements in the early nineteenth century. Appendix at 108, 285, Drummond Aff. ¶ 19, Spink Aff. ¶ 18. The City has a "rich inventory of buildings of special historical and/or architectural significance." Appendix at 108, Drummond Aff. ¶ 19.

Since its incorporation as a city in 1936, Ladue has made an extraordinary commitment to careful planning and zoning. Ladue has codified its zoning and land-use restrictions and has diligently enforced its comprehensive regulations to preserve the aesthetic and private qualities of Ladue's residential community. Appendix at 112-118, 183, 215, 288-295, Drummond Aff. ¶¶ 32-57.

Malcolm Drummond summarized his opinion of Ladue's unique ambience:

> The large lot sizes and low building density have allowed for the maintenance of large areas of plant materials, woods, streams and open areas which make Ladue unique in the Midwest; I have done professional work for such midwestern cities as Indianapolis, Detroit, Cleveland, Chicago, Minneapolis, Omaha, Kansas City, Memphis, Dallas and Houston and, while each has lovely residential suburbs, in my opinion none has any suburb which can compare with Ladue in its aesthtetic ambience and privacy or in the charm and visual quality it has been able to maintain through preservation of its low density, rustic, heavily-wooded, uncluttered and open appearance.

Appendix at 117-118, Drummond Aff. ¶ 56.

3. *A Proliferation Of Signs And Resulting Visual Blight Will Occur If The City of Ladue Is Not Permitted To Limit The Number Of Noncommercial and Commercial Signs.* Based upon his many years of professional experience, Drummond opined that the failure to regulate signs in Ladue will create a serious proliferation problem, which already exists in many municipalities in St. Louis County. Appendix at 123-125, Drummond Aff. ¶¶ 78-90. *See also* Appendix at 302-303, Spink Aff.; Spink Supplemental Aff. at 3, Ladue's Supplemental Appendix (additional factual support for Drummond's findings).

Drummond testified that those cities in the St. Louis area that have chosen not to regulate signage strictly have suffered the consequences of proliferation and visual blight. Appendix at 123-124; Drummond Aff. at ¶¶ 81-82. As Drummond observed:

> Based upon my personal knowledge and experience, many municipalities in St. Louis County which do not strictly limit the erection of signs frequently experience a proliferation of yard signs and placards and temporary public signs in the public rights-of-way; this is true especially in the campaigns before municipal, primary, or general elections but such proliferation can and often does occur at other times as well; I have observed such proliferation in Ferguson, Webster Groves, St. Ann, Berkeley, Manchester and Ellisville, which are all cities in the St. Louis metropolitan area which I have served as a Planner.

Appendix at 123-124; Drummond Aff. ¶ 81.

The lower courts were required to accept Drummond's and Spink's affidavits as true under traditional summary judgment principles. Neither the Eighth Circuit nor the District Court, however, mentioned the significance of Ladue's extraordinary evidentiary record in support of its sign ordinance.[5]

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[5] The only evidentiary dispute on the record between the parties involved the meaning of some answers by the Mayor and a councilman to hypothetical questions about the variance clause in the

4. *Ladue's Sign Ordinance Does Not Permit Gilleo To Place Yard Signs In Her Private Residential Subdivision.* Plaintiff Margaret P. Gilleo resides on Willow Hill Lane, a private street in the Willow Hill subdivision of Ladue. Appendix at 306, Spink Aff. ¶¶ 99, 101, 103. Willow Hill Lane is typical of most of Ladue's 207 private subdivision streets. Appendix at 296, Spink Aff. at ¶¶ 65, 66. While the street is "country-like, charming and private," it is also extremely narrow and winding and lacks adjacent sidewalks. Appendix at 296, Spink Aff. at ¶ 65.

Gilleo has maintained signs at her house bearing the legends, "Say No To War In the Persian Gulf/Call Congress Now," and "For Peace In The Gulf." Appendix at 10 (Plaintiff's Complaint ¶ 5); Appendix at 381 (Defendants' Amended Counterclaim, ¶ 11). Gilleo's signs are not permitted under Ladue's sign ordinance. App. F at 40a.

Gilleo filed a Complaint against Ladue pursuant to 42 U.S.C. § 1983 in which she challenged the constitutionality of Ladue's sign ordinance under the First Amendment of the United States Constitution. Gilleo sought injunctive relief to prevent Ladue from enforcing its sign ordinance.

After each party filed motions for summary judgment, the District Court entered Judgment for Gilleo, held that Ladue's sign ordinance violated the First Amendment, and permanently enjoined Ladue from enforcing its sign ordinance.[6] The District Court and the Eighth Circuit

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previous sign ordinance. This dispute is legally irrelevant because New Chapter 35, the sign ordinance at issue, repealed the variance provision that was debated in Ladue's predecessor sign ordinance.

[6] Although Ladue's sign ordinance has a severability clause, the District Court effectively refused to enforce it by enjoining the ordinance's section 35-2, which prohibits all signs, as well as section 35-4, which allows limited exceptions to the general prohibition against signs.

each granted Gilleo a substantial award for attorneys' fees and expenses pursuant to 42 U.S.C. 1988.[7]

REASONS FOR GRANTING THE PETITION

A. The Eighth Circuit And The District Court Relied On Portions Of The Plurality Opinion In *Metromedia v. City Of San Diego*, 453 U.S. 490 (1981), Which Conflict With This Court's Test For Reasonable "Time, Place, Or Manner" Regulations Of Speech.

The Eighth Circuit and the District Court relied on the plurality opinion in *Metromedia* to hold that Ladue's sign ordinance was unconstitutional. App. A at 3a-4a (Eighth Circuit opinion); App. C at 16a-17a and D at 25a-29a (District Court opinion).[8] These courts inter-

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[7] After receiving "demand" letters from Gilleo's attorneys for payment of plaintiff's attorneys' fees and expenses, Ladue was compelled to pay these awards in full. If, however, this Court grants certiorari and vacates or reverses the Eighth Circuit judgment, Gilleo will have no right to payment of any attorneys' fees and expenses under 42 U.S.C. § 1988. Under these circumstances, Gilleo and her attorneys must immediately return all attorneys' fees, expenses, and accrued interest to Ladue.

[8] The Eighth Circuit and the District Court erred in treating the plurality's opinion in *Metromedia* as a holding of the Supreme Court. In *Marks v. United States*, 430 U.S. 188 (1977), the Court stated that "[w]here no majority emerges in support of any single new standard, 'the controlling opinion . . . is that of the Justice or Justices who concur on the 'narrowest grounds.'"

In *Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990), District Judge (now Circuit Judge) Rovner thoroughly analyzed the *Metromedia* plurality's implied discrimination theory and concluded that it has no value as precedent because it has been rejected by a majority of the Justices on the Supreme Court. *Id.* at 1447 n.20. The court explained that "the reasoning of the concurrence is not simply narrower or broader than that of the plurality; rather, it is directly contrary to that of the plurality." *Id.*

Judge Rovner observed that a majority of the Justices on the *Metromedia* Court (Chief Justice Burger and Justices Brennan, Blackmun, Rehnquist, and Stevens) agreed that an ordinance could

preted the plurality opinion in *Metromedia* to compel the legal conclusion that Ladue's sign ordinance violated the First Amendment because it prohibited most noncommercial and commercial signs but provided exceptions for a limited number of noncommercial and commercial signs. App. A at 3a-5a (Eighth Circuit opinion); D at 26a-27a (District Court opinion). According to the courts below, the exceptions in Ladue's sign ordinance implicitly mean that "the city was improperly choosing appropriate subjects for public debate." App. A at 40a (quoting *Metromedia*, 453 U.S. at 514-515)) (Eighth Circuit opinion); App. D at 26a (District Court opinion).[9]

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be constitutional even if it generally prohibited most types of billboards but permitted limited exceptions. *Id.* at 1442. Judge Rovner concluded, "[A]lthough the plurality found that the exceptions constituted an impermissible content-based distinction, a majority of the Justices stated that the limited exceptions to the San Diego's ordinance's general prohibition on billboards were too insignificant to rise to the level of content-based discrimination." *Id.* at 1445.

[9] Justices Brennan and Blackmun criticized the *Metromedia* plurality's implied discrimination theory. They concurred in the Court's judgment but expressly rejected the "all or nothing" approach of the plurality's implied discrimination theory. Indeed, in his concurring opinion, Justice Brennan went so far as to characterize the plurality's view as "mak[ing] little sense." 453 U.S. at 532 n.10 (Brennan, J., concurring, joined by Blackmun, J.).

Justices Brennan and Blackmun would permit a prohibition of signs with narrowly tailored exceptions. 453 U.S. at 532. Before upholding such a prohibition, however, Justices Brennan and Blackmun would require the municipality to make a record that it is "seriously and comprehensively addressing aesthetic concerns . . . . By showing a comprehensive commitment to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored excetpions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial." 453 U.S. at 531, 532, 533.

Justices Brennan and Blackmun concluded that they had "little doubt" that some jurisdictions—such as the historic community of

The assumption underlying the *Metromedia*'s plurality's implied discrimination theory was that *San Diego* failed to explain why its decision to exclude some types of signs from its general prohibition of signs advanced its goals of aesthetics and safety. 453 U.S. at 513, 514 ("The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city . . . . No other commercial or ideological signs meeting the structural definition are permitted, regardless of their effect on traffic safety or esthetics.").

Ladue's sign ordinance is distinguishable from the *San Diego* ordinance that was criticized by the *Metromedia* plurality. Unlike San Diego's ordinance, Ladue's ordinance provides a sound and reasonable explanation for its allowance of certain signs. Ladue only permits signs that do not proliferate because they are naturally limited in number, or signs that protect the public's safety.

The District Court did not explain its conclusion that Ladue's extensive and uncontested record of the content-neutral purpose and justification for its sign ordinance does not distinguish Ladue's sign ordinance from San Diego's billboard ordinance. The Eighth Circuit asserted

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Williamsburg, Virginia—could prove the substantiality of their interest in aesthetics. 453 U.S. at 534.

The City of Ladue is precisely the type of unique community—dedicated to furthering the goals of aesthetics and safety—that can meet these strict constitutional standards under which a prohibition on signs with narrowly tailored exceptions would be permitted. The affidavits of Malcolm C. Drummond and Mayor Spink, and the exhaustive set of exhibits in supoprt of each affidavit, provide this Court with an extensive record of Ladue's extraordinary commitment to fostering the important content-neutral values upon which Ladue's sign ordinance is based.

The Eighth Circuit and the District Court did not address Ladue's argument that its sign ordinance was constitutional under Justices Brennan and Blackmun's strict test.

that Ladue failed to explain the rationale for its sign ordinance. App. at 5a-6a, n.7 (quoting *Metromedia*, 453 U.S. at 513)). The Eighth Circuit, however, appears to reject or misunderstand Ladue's proliferation rationale, applicable to each exception, which was supported by a substantial uncontested evidentiary record filed in the summary judgment proceedings.

The *Metromedia* plurality's "implied discrimination theory conflicts with the reasoning of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *Ward* is the seminal case that explains the elements of the test for reasonable "time, place, or manner" regulations of speech.[10] The first element *defines* the term "content-neutral." The Court held that in determining whether a statute is "content-neutral," "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others [citation omitted]. Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" 491 U.S. at 791 (quoting *Clark v. Community For Creative Non-Violence*, 468 U.S. at 288 (1984) (emphasis added in *Ward*)). The Court applied its test for content-neutrality to uphold New York City's noise ordinance, designed to protect residents from loud and disturbing sound caused by musical concerts in Central Park. *Ward*, 491 U.S. at 785-803.

The problem that Ladue faces is not confined to Gilleo's yard signs. Rather, the problem is the proliferation of

[10] The "time, place, or manner" test is appropriate because Ladue's sign ordinance involves the regulation of signs and not a total ban on signs. Noncommercial and commercial signs are permitted if they do not proliferate. In addition, Ladue's sign ordinance only regulates one medium of speech by signs. Gilleo and others have numerous other mediums of speech to express themselves on any issue.

signs and the resulting visual blight that would occur if Ladue is compelled to allow all signs containing noncommercial speech. *See* Appendix at 123-127, Drummond Aff. ¶¶ 78-97 (discussing evidence of sign proliferation in municipalities in St. Louis County and explaining how Ladue's sign ordinance prevents the deleterious effects of this proliferation). As the Supreme Court concluded in *Ward*, "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." 491 U.S. at 801.

The District Court and the Eighth Circuit misunderstood this Court's holding in *Ward* that "content-neutrality" is defined by Ladue's "justification" for its sign ordinance. The District Court attempted to distinguish *Ward* as follows: "Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific mix of the music, New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs." App. C at 16a.

The District Court's opinion is contradicted by the Supreme Court's analysis in *Ward*. The Court acknowledged that volume is part of the "content" of musical expression and indeed is a key component of one's First Amendment right to express rock music. 491 U.S. at 786 n.1. Even though New York City's ordinance restricted Plaintiff's First Amendment right by allowing the city's sound technician to regulate the volume of the music, the Court upheld the ordinance because it was justified by the content-neutral purpose of maintaining a quiet environment in nearby residential neighborhoods. *Id.* at 792.

Ladue's sign ordinance is justified for similar content-neutral reasons. Ladue acted to protect the quality of life of its residents by prohibiting signs that proliferate, cause visual blight, create safety problems, and diminish

the value of residents' homes and real estate. The District Court erred in not recognizing the constitutional significance of the detailed justifications contained in Ladue's sign ordinance.

The Eighth Circuit was also confused about how to apply the *Ward* test. Apparently based on its erroneous interpretation of the plurality opinion in *Metromedia,* the Court assumed that Ladue's ordinance was content-based. App. A at 3a-5a. Presumably, the Court then erroneously assumed that the *Ward* analysis was irrelevant and proceeded to a discussion of the "secondary effects" test under *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49 (1986). App. A at 5a.

The Eighth Circuit also ignored this Courts' holding in *R.A.V. v. City of St. Paul,* —— U.S. ——, 112 S. Ct. 2538, 2545-2546 (1992). There, this Court followed *Ward* when it held that government may create classifications or exceptions in its regulatory scheme as long as each classification is jusified by a content-neutral reason.[11]

Consistent with the principles of content-neutrality explained in *Ward* and *R.A.V.*, the Court in *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1515 (1993), reserved the questions of "whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment

[11] ***R.A.V.*** **signalled the demise of the District Court's and Eighth Circuit's holdings that Ladue discriminated against non-commercial speech because it permitted a limited number of signs. R.A.V. held that exceptions are permitted as long as the "selectivity of the restriction is [not] "even arguably 'conditioned upon the sovereign's agreement with what a speaker may intend to say.'" 112 S. Ct. at 2547 (quoting *Metromedia*, 453 U.S. 490, 555 (Stevens, J., dissenting in part)). Justice Stevens' dissent in *Metromedia*, which would support the constitutionality of Ladue's sign ordinance, has now overtaken *Metromedia's* plurality opinion. The lower court opinions have lost their intellectual foundation and, therefore, should be reversed.**

of commercial and noncommercial newsracks." 113 S. Ct. at 1516. The Court stated that a city must establish a "neutral jusification" to support the constitutionality of a "content-neutral" ordinance under the First Amendment doctrine that permits government to enact reasonable "time, place, or manner" regulations of speech. *Id.* at 1515, 1517.

Sign proliferation causing visual blight and safety problems are content-neutral reasons that justify Ladue's decision to prohibit all signs that are likely to proliferate. In *Discovery Network,* the Court observed that Cincinnati was not defending its ordinance on the ground that commercial newsracks proliferate. *Id.* at 1515. This observation is important because in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 (1984), the Court recognized that a proliferation of signs would likely develop in a city that does not regulate the number of permitted signs. 466 U.S. at 817. The Court further acknowledged the adverse effect on the "quality of life" and the "value of property" created by the proliferation of signs. *Id.*

Vincent and *Discovery Network* establish that Ladue's sign ordinance satisfies this Court's test that permits reasonable "time, place, or manner" regulations of speech. *Vincent,* 466 U.S. at 804-805, 810, 817; *Discovery Network,* 113 S. Ct. at 1516-1517 (citing *Ward v. Rock Against Racism,* 491 U.S. at 791 and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986)) (ordinance will not violate First Amendment if it is justified by content-neutral "secondary effects" of speech).

Ladue's sign ordinance contains a detailed declaration of "findings, policies, interests, and purposes" which demonstrate Ladue's comprehensive commitment to the beautification of its city since it was formed in 1936. The declaration explains the content-neutral reasons for Ladue's decision to prohibit all signs with the limited exception of those that do not proliferate or cause safety problems. App. F at 35a-38a.

The declaration in the ordinance is supported by the uncontested affidavit of Malcolm C. Drummond, a nationally renowned land-use expert. Drummond testified that in the absence of New Chapter 35, signs would proliferate in Ladue and create visual blight, safety problems, and a deterioration of real estate values. Eighth Circuit Appendix at 122-135, Drummond Aff. at ¶¶ 77-90.

In addition to the element of content-neutrality, Ladue's sign ordinance satisfies the additional two elements of this Court's test for reasonable "time, place, or manner" regulations of speech:

1. The regulations are "narrowly tailored to serve a significant governmental interest." [12] *Ward*, 491 U.S. at 791; and

2. The regulations "leave open ample alternative channels for communication of the information." *Id.*

Ladue's sign ordinance satisfies each of the constitutional criteria for "narrow tailoring" discussed by the Court in *Discovery Network*.[13] First, unlike Cincinnati's

[12] The District Court and the Eighth Circuit acknowledged the well accepted proposition that Ladue's interests in aesthetics, safety, and the protection of real estate values are substantial. App. at D at 31a (Eighth Circuit); App. at A at 7a (District Court). *See, e.g., Vincent*, 466 U.S. at 806-87, 816-18.

[13] The *Discovery Network* Court reviewed Cincinnati's ban of commercial newsracks under the test in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). This Court has used the *Central Hudson* test to evaluate governmental regulations of commercial speech. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that the test for reviewing regulations of commercial speech is "substantially similar" to the Court's "time, place, or manner" test for reviewing regulations of non-commercial speech. *See Discovery Network, Inc.*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (opining that "time, place, or manner" test is duplicative of *Central Hudson* test). *See also id.* at 1510 n.11 (reserving question of whether commercial speech is entitled to "more exacting" review).

old ordinance that was enacted before newsracks created an aesthetic problem, Ladue's New Chapter 35 was enacted to address safety problems and visual blight caused by the proliferation of signs. 113 S. Ct. at 1510.

Second, the Court characterized the Cincinnati ordinance as having a "paltry" or "minute" effect on reducing the total number of newsracks and, as a result, the ordinance did not address the problem of visual blight. On the other hand, the Ladue sign ordinance eradicates the problem of visual blight by prohibiting the vast majority of signs in the City. *Id.*

Third, whereas Cincinnati could have helped to remedy its problem by regulating the "size, shape, appearance, or number" of newsracks, these alternatives would not resolve the problem that Ladue faces with the prevention of a proliferation of signs. *Id.* Ladue already regulates the size and number of the few signs that are permitted so that the aesthetics of the community will be maintained.

As the Court observed in *Vincent*, "the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810, 104 S. Ct. at 2131. Thus, "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808.[14]

The District Court and the Eighth Circuit have placed Ladue in a "Catch 22" position. These courts have overturned Ladue's sign ordinance because it permits exceptions

[14] Ladue's sign ordinance also satisfies the test in *Ward* for "narrow tailoring." *Ward* held that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" 109 S. Ct. at 2758 (quotation omitted).

Ladue's sign ordinance satisfies *Ward's* test. By limiting the number of signs permitted in Ladue, the ordinance prevents the proliferation of signs that causes visual blight and other problems.

to its total ban of signs. Yet, even if Ladue were realistically able to ban all signs (which it is not), such an ordinance would be held to be unconstitutional because it would be overbroad—banning signs even if they do not proliferate and cause visual blight or other problems. By carefully permitting exceptions to its ordinance, Ladue is protecting First Amendment interests by allowing as much speech as possible through the meduim of signs.

The summary judgment record is uncontested that Ladue satisfies the third element of the "time, place, or manner" test. Ladue's sign ordinance leaves Gilleo and others alternative mediums of speech in which to express themselves effectively other than through signs. These mediums include letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.

This Court should grant the Petition to clarify the application of the test for "time, place, or manner" regulations of speech to signs and billboards.[15]

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[15] The Court does not need to decide the applicability of the compelling state interest test because Ladue's sign ordinance should be upheld under the "time, place, or manner" test as a content-neutral regulation of signs. Nevertheless, Ladue notes that its compelling state interests include its police powers, its right under the Tenth Amendment, and its right under the "liberty" and "property" clauses of the Fourteenth Amendment to protect the quality of life of its residents by prohibiting signs that scar the natural beauty of their living environment. Ladue also has a compelling interest under the First Amendment to permit as much speech as possible through its exceptions to its general ban on signs.

The Eighth Circuit stated without any support that "[w]e have no trouble concluding that Ladue's ordinance is not the least restrictive alternative." App. A at 7a. Gilleo has been unable to suggest a single alternative that is constitutional or that Ladue is not already using to protect the aesthetics of its community.

B. The Eighth Circuit Has Caused Confusion for First Amendment Speech Jurisprudence by Misapplying The "Secondary Effects" Test And Failed To Recognize That Ladue's Concern About The Proliferation Of Signs Is A Content-Neutral Justification For Its Sign Ordinance.

Despite its erroneous conclusion that Ladue's sign ordinance was content-based, the Eighth Circuit acknowledged the ordinance would be constitutional if it satisfied the "secondary effects" doctrine. App. A at 5a. The court correctly stated that the Ladue sign ordinance would not violate the First Amendment if it could show that it was "justified by a desire to eliminate a "secondary effect"—an undesirable effect unrelated to the content or communicative impact of speech." *Id.* The Eighth Circuit panel also correctly identified the principal content-neutral secondary effects that Ladue identified to justify its ordinance—"visual blight, unsafe conditions, and decreased property values." *Id.*

The Eighth Circuit, however, proceeded to misapply the secondary effects doctrine, ultimately concluding that the doctrine was "inapposite" and that the ordinance was unconstitutional. *Id.* at A at 5a-6a. The court's holding is contradicted by the unambiguous language of the ordinance and the uncontroverted evidence in the summary judgment record.

The Eighth Circuit chose to ignore the purposes of Ladue's sign ordinance as well as Ladue's content-neutral justifications for the signs that are prohibited and permitted under the ordinance. Moreover, contrary to controlling case-law, the court did not even refer to the substantial uncontested evidentiary record that supports the distinctions made in the ordinance.

A careful analysis of the language in the Eighth Circuit's opinion demonstrates that the Eighth Circuit's position is indefensible as a matter of law. The Court stated:

> Ladue fails at sufficiently supporting its secondary-effects argument. Specifically, Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs. Stated in other words, the prohibited signs are no more associated with the particular "secondary effects" more than many of the permitted signs. . . . Ladue has "singled out" categories of signs for discriminatory treatment. The fact that the ordinance's differential treatment does not correlate with Ladue's interest in eliminating the secondary effects undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs.

App. A at 5a-6a. In a footnote to the text of the opinion, the Eighth Circuit panel concedes Ladue's justification for its ordinance is to prohibit the proliferation of signs. ("[T]he ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents."). App. at A at 6a. The court, however, claims that Ladue "has failed to provide sufficient factual support for this proliferation rationale." App. A at 6a n.7.

The Eighth Circuit's first error of law was its wholesale rejection of the undisputed factual foundation for Ladue's proliferation justification for its sign ordinance. The court, in effect, rejected the detailed content-neutral explanations in the text of the ordinance of the purpose for the prohibition of signs and of each exception. *See* App. F at 35a-38a. In addition, contrary to the well accepted principles for the standard of review in summary judgment proceedings and "time, place, or manner" regulations of speech,[16] the court, in effect, rejected

[16] The Eighth Circuit violated two legal standards governing review of a city's ordinance regulating the "time, place, or manner" of speech. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986), the Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce new evidence of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Furthermore, in *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), this Court reaffirmed the courts' duty to defer to a city's reasonable judgment as to the best way of addressing the problems it faces.

the uncontested affidavits of Malcolm Drummond and Mayor Spink. These affidavits laid the factual foundation of the danger of sign proliferation that would upset Ladue's historic commitment to the beautification of its small, residential community. *See Vincent,* 466 U.S. at 795 (reversing the court of appeals' rejection of the "sufficiency" of the city's justification for its ban on signs).

The Court's most significant legal error is its failure to recognize that each of the permitted signs is justified on the principle whether they "contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs." New Chapter 35, Article I, App. F at 37a.

The Eighth Circuit had no principled basis to suggest that the permitted signs proliferate or are not needed to protect the safety of the community. App. F at 40a-41a (list of all permitted signs). The exceptions do not reflect that Ladue is discriminating in favor of any signs; the exceptions exist because these signs do not trigger Ladue's concerns of proliferation, visual blight, or safety.

The District Court contended that Ladue's sign ordinance was unconstitutional because it permitted real estate signs. The court overlooked the content-neutral justification for this exception stated in Article I of the sign ordinance. App. F at 36a-37a. Ladue permits "for sale" and "for lease" signs for two reasons: 1) Missouri law

requires municipalities to permit them; and 2) the limited number of homes for sale or for lease at any given time prevent their proliferation. *Id.*

The Eighth Circuit claimed the sign ordinance was content-based because it permitted commercial signs in commercially zoned districts and announcement signs at schools and churches. App. A at 6a n.7. The court, however, overlooked the fact that both of these types of signs cannot proliferate because of the limited number of commercial businesses in the small commercially-zoned area of Ladue (1% of the entire geographic area) and the relatively few schools and churches in the city.

In addition, the court failed to consider that the *location* of the sign is an important factor because each of these signs directly relates to identification of an "on-premises" activity. If commercial establishments, schools, and churches were not able to have at least one sign, they could not operate as they would have no realistic way of communicating with the public about their precise location. As the United States Justice Department has observed in its criticism of the Eighth Circuit opinion, the court failed to appreciate the distinction between on-site signs that do not proliferate and off-site signs that do proliferate. *See infra* § F.

Furthermore, the Eighth Circuit did not address the constitutional problem created by its own argument. If noncommercial or political signs, for example, were permitted in commercially zoned areas or at schools and churches, those few property owners would control the political debate in Ladue and could discriminate against the rights of all owners of residential property who were not permitted to erect political signs that can proliferate and cause visual blight. As this Court observed in *Vincent*:

> [N]or is it clear that some of the suggested exceptions [to a prohibition of political signs] would even be constitutionally permissible. For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every women has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional execption from the ordinance that is just as strong as "Roland Vincent—City Council." [citation omitted]. To create an exemption for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. [citation omitted]. Moreover, the volume of permissible postings under such a mandated exemption might so limit the ordinance's effect as to defeat its aim of combatting visual blight.

466 U.S. at 816.

This Court, therefore, should grant the petition to clarify the First Amendment principles that, as reflected by the opinions of the Eighth Circuit and the District Court, have been misunderstood by the lower federal courts.

C. There Is A Conflict Among The Circuit Courts On The Issue Of The Controlling First Amendment Principles Which Should Apply To Review A City's Ordinance That Prohibits Only Those Signs Which Cause Visual Blight And Safety Hazards.

As evidenced by the Eighth Circuit's opinion in the case at bar, the lower courts are in confusion and disarray as to the appropriate First Amendment standards that apply to the issue of sign regulations designed to prevent visual blight and other evils that plague our nation's cities. While this Court has developed over the past few years significant changes in the test for "time, place, or manner" regulations of speech, the Eighth Circuit and other lower courts continue to apply rigidly the outdated plurality opinion in *Metromedia*.

The Eighth Circuit in the case at bar as well as the First, Second, and Ninth Circuits have ignored the fact that a majority of the Justices in *Metromedia* rejected the plurality's "all or nothing-at-all" aproach, under which a city must either ban all signs or permit all signs. *See,*

e.g., Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985); *National Advertising Co. v. Town of Niagara,* 942 F.2d 145 (2nd Cir. 1991); *National Advertising Co. v. City of Orange,* 861 F.2d 246 (9th Cir. 1988).

On the other hand, the Fifth and Seventh Circuits have upheld sign ordinances that, like Ladue, do not prohibit all signs. These Circuits have upheld ordinances banning portable signs that create aesthetic problems. *See, e.g., Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987); *Harnish v. Manatee County, Florida,* 783 F.2d 1535 (11th Cir. 1986).

The Fifth Circuit also has upheld a city's ordinance that prohibits off-premises signs with certain exception from its regulatory scheme. *Messer v. City of Douglasville, Ga.,* 975 F.2d 1505 (11th Cir. 1992), *cert. den.,* —— U.S. —— (May 17, 1993). The Sixth Circuit in *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky,* 822 F.2d 586 (6th Cir. 1987), *cert. denied,* 484 U.S. 1007 (1988) has upheld Kentucky's Highway Beautification Statute, Ky. Rev. Stat. Ann., §§ 177.830-177.890 (Baldwin 1985), which prohibits—with limited exceptions—billboards on its highways.

The confusion among the lower courts is exemplified by a recent Fourth Circuit case, *Arlington County Republican Committee v. Arlington County, Virginia,* 983 F.2d 587 (4th Cir. 1993), in which a divided panel held that a county's limit of two signs on residential, private property infringed speech by preventing multiple signs for multiple candidates. 983 F.2d at 594. Moreover, contrary to this Court's express rejection in *Ward,* 491 U.S. at 798-799, of the suggestion that a city's "time, place, or manner" regulation of speech be the least-restrictive" alternative, the majority of the Fourth Circuit panel held that the County was required to prove that it "could promote its interests through other, less restrictive means." *Arlington County Republican Commitee,* 983 F.2d at 594.

This Court should grant the petition to resolve the conflict among the circuits and clarify the law for the lower courts as well as for local, state, and federal governmental officials.

D. The Eighth Circuit's And District Court's Opinions, Which Are Premised On The Erroneous Principle That Noncommercial Speech Deserves Greater Constitutional Protection Than Commercial Speech, Conflict With The Reasoning Of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993).

Relying on the plurality opinion in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 493-521 (1981), the District Court and the Eighth Circuit held that because Ladue permits limited exceptions to its prohibition of signs, Ladue's sign ordinance violates the First Amendment by "favoring commercial speech over noncommercial speech and by favoring certain types of noncommercial speech over others." App. F at 8a (Court of Appeals' Opinion); App. F at 31a (District Court's Opinion).

An assumption of the plurality opinion in *Metromedia,* on which the Eighth Circuit and the District Court principally rely, is that "noncommercial speech is accorded greater protection under the First Amendment than is commercial speech." *Metromedia,* 453 U.S. at 513; App. D. at 26a (District Court's opinion); App. A at 4a & cases cited therein (Court of Appeals' opinion).

The Eighth Circuit's and the District Court's opinions conflict with *City of Cincinnati v. Discovery Network, Inc.,* —— U.S. ——, 113 S. Ct. 1515 (1993). There, the Court held that a city's ordinance prohibiting newsracks containing commercial newspapers was unconstitutional because it "attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." 113 S. Ct. at 1511.

In contrast to Cincinnati's newsrack ordinance, Ladue's sign ordinance is not based on an erroneous constitu-

tional distinction between noncommercial and commercial speech. Ladue prohibits all noncommercial and commercial signs that proliferate and cause visual blight, or that cause safety hazards. To the extent that signs do not proliferate, or cause safety problems, they are permitted.

The Court concluded that Cincinnati's ordinance, that was premised on the distinction between commercial and noncommercial speech, "bears no relationship *whatsoever* to the particular interests [of aesthetics and safety] that the city has asserted." 113 S. Ct. at 1514 (emphasis added). On the other hand, the guiding principle of Ladue's sign ordinance—whether the signs are likely to proliferate or cause safety hazards—directly relates to the city's interest in preventing visual blight and the deterioration of real estate values while also protecting the safety of the residents.

E. This Court Should Address The Policy Question Of Whether The First Amendment Permits A City To Enact A Reasonable Ordinance That Will Enable A City To Eradicate Visual Blight and Other Evils Caused By A Proliferation Of Signs.

The Eighth Circuit's opinion brings into sharp focus the theoretical and practical problems that have plagued the *Metromedia* plurality's "implied discrimination" theory for over a decade. Former Chief Justice Burger expressed the dilemma as creating "series of Hobson's choices" on all cities that desire to regulate the placement of signs and billboards. *Metromedia*, 453 U.S. at 569. The Chief Justice observed that "American cities . . . must, as a matter of *federal constitutional law*, elect between two unsatisfactory options: a) allowing all "noncommercial" signs, no matter how many, how dangerous, or how damaging to the environment; or b) forbidding signs altogether." *Id.* at 556 (Burger, C.J., dissenting) (emphasis in original).[17] *See also id.* at 540, 555 (Stevens, J., dissenting in part) (agreeing with the opinion of Burger, C.J.); *id.* at 569 (Rehnquist, J., dissenting) (agreeing substantially with the opinion of Burger, C.J.).

[17] Leading academic commentators agree with Chief Justice Burger's conclusion. *See, e.g.*, D.R. Mandelker and W.R. Ewald, *Street Graphics and the Law* 190 (criticizing the *Metromedia* plurality's opinion "because it places municipalities in an impossible position").

More than ten years ago, Justice (now Chief Justice) Rehnquist predicted that the *Metromedia* opinion would be viewed by "city planning commissions and zoning boards [who] must regularly confront constitutional claims of this sort . . . as a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (Rehnquist, J., dissenting).

Experience has proven that Chief Justice Rehnquist's prediction has come true. The lower courts as well as the cities, states, and federal governmental authorities desperately need guidance as to the First Amendment principles that should be applied to the regulation of signs. This Court should grant the petition to announce the appropriate constitutional principles.

F. The United States Has Criticized The Eighth Circuit's Opinion Which Jeopardizes The Constitutionality Of The Highway Beautification Act Of 1965.

The District Court's "all or nothing," "implied discrimination" theory raises questions about the constitutionality of the federal Highway Beautification Act of 1965 (hereinafter "Act"), 23 U.S.C.A. § 131 *et seq.* (West Supp. 1990). *See Metromedia*, 453 U.S. at 515 n.20 (reserving question concerning the constitutionality of the Act).

The purpose of the Act is to regulate signs and billboards adjacent to the interstate highway system "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C.A. § 131(a). The Act contains a list of exceptions to its general ban of

signs within the regulated area. These exceptions permit signs that include:

1. "directional and official signs;"
2. signs "advertising sale or lease of the property upon which they are located;"
3. signs "advertising activities conducted on the property on which they are located;"
4. "landmark signs . . . of historic or artistic significance;" and
5. signs "advertising distribution by nonprofit organizations of free coffee to individuals traveling" on the highways.

23 U.S.C.A. § 131(c).

Based upon the District Court's theory, one might argue that the limited number of signs that are permitted under the Act reflects Congress' implied intent to discriminate against political and other forms of noncommercial speech that are prohibited under the federal legislation. On the other hand, the Act would pass the "time, place, or manner" test under *Ward*, *R.A.V.*, and *Vincent* because the exceptions in the statute reflect the content-neutral purposes or justifications for the Act—preservation of the natural scenic beauty of the landscape, safety, and protection of the "public investment" in the highway system. The permitted signs would allow as much speech as possible while also preventing the proliferation of signs and the resulting visual blight. *See Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590, 591 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (upholding constitutionality of Kentucky's Billboard Act, Ky. Rev. Stat. Ann. §§ 177.830-177.890 (Baldwin 1985), because it was content-neutral under *Ward* and *Renton* in that it was justified by aesthetic considerations).

Ladue contended in its briefs filed in the Eighth Circuit that the reasoning of a ruling that would overturn Ladue's sign ordinance would compel a similar holding

for the federal Highway Beautification Act. The Eighth Circuit declined to address Ladue's contention.

In a case pending before the United States Court of Appeals for the Third Circuit, *Rappa v. McNulty*, No. 92-7293 (3rd Cir. argued January 20, 1993), the Court invited the United States Justice Department to address the issue of the constitutionality of the federal Highway Beautification Act. The underlying litigation arose from a challenge to the constitutionality of the Delaware Outdoor Advertising Law, Del. Code Ann. tit. 17, §§ 1101-1126, by Daniel Rappa, a candidate for election to the United States House of Representatives who was not permitted to display his campaign signs.

The United States filed an *amicus curiae* on April 7, 1993. The Justice Department sharply criticized the Eighth Circuit's opinion in *Gilleo v. City of Ladue* as reflecting the confusion in the lower courts as to the proper First Amendment analysis that should be applied to governmental regulations of signs. The Government included the Eighth Circuit with several other courts that have "appeared to take the view that exceptions for onsite signs are necessarily content-based and unlawful, at least in the absence of preferential treatment of noncommercial messages." Brief for the United States as amicus curiae at 25, *Rappa v. McNulty*, No. 92-7293 (3d cir. argued January 20, 1993). The United States asserted that like *Gilleo* and other cases with similar faulty constitutional reasoning, the Delaware District Court "fell into . . . error[] . . . presuming without careful analysis that the Delaware law favored commercial over noncommercial speech, merely because it permits onsite signs." *Id.* at 26.

The United States focused on *Gilleo* to highlight an additional serious constitutional error in the Eighth Circuit's view of "time, place, or manner" First Amendment jurisprudence which is inconsistent with this Court's opinion this Term in *Discovery Network, Inc.* The Government observed that the proliferation of signs is an important justification for creating content-neutral distinctions

in a sign ordinance. *Id.* at 35-36 & n.22. The Justice Department criticized the Eighth Circuit for "fail[ing] to recognize these inherent differences" between onsite signs, that do not tend to proliferate and are "self-limiting," and offsite signs that are "far more prone to proliferation." *Id.* at 36 & n.22.[18]

G. The Court Should Invite The Solicitor General To Express The Views Of The United States On The Merits Of The Petition.

The City of Ladue respectfully asks the Court to invite the Solicitor General to express the views of the United States on the merits of the petition. The issues raised in this petition involve environmental questions of national importance. A serious problem of sign pollution and visual blight exists in cities throughout the United States as well as on the nation's highways that have been protected by the Highway Beautification Act for almost thirty years. The Court would benefit from the Solicitor General's analysis of the First Amendment issues and

[18] The Justice Department explained that the prevention of a proliferation of signs is a central content-neutral goal of legislation aimed at reducing the number of permitted signs to be displayed. "[O]utdoor sign laws are aimed in large part at controlling the *proliferation* of signs. It may well be impossible to eliminate *all* signs from our highways. However, a 10-mile stretch of scenic highway interrupted by ten signs will still offer many attractive vistas, while one with 100 or 1000 signs will not. An onsite/offsite distinction directly furthers the interest in controlling the number of signs, because onsite signs are self-limiting." Brief at 35-36.

The guiding principle of Ladue's sign ordinance is the prevention of the proliferation of signs and the resulting visual blight and impairment of real estate values. The rationale for the distinction between offsite signs (which are prohibited) and onsite signs that are used for identification or are related to site activities (which are permitted) is that onsite signs are necessary because alternative means of communication generally do not exist and, by definition, cannot proliferate at other locations.

Yard signs such as those such as the Plaintiff Gilleo should be classified as offsite signs. They do not identify or relate to activities on the premises and there are numerous alternative and effective means of communication of the message.

his perspective on the jurisprudential uncertainty that exists in the lower federal courts.

H. This Court Should Grant The Petition, And Set The Case For Full Briefing And Argument On The Merits; Alternatively, The Court Should Vacate The Judgment And Remand To The Eighth Circuit For Further Consideration In Light Of *City Of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993).

The Eighth Circuit's opinion pre-dated this Court's opinion in *Discovery Network, Inc.* Ladue has demonstrated that the Eighth Circuit's opinion conflicts with the reasoning of *Discovery Network, Inc.* At a minimum, therefore, the Court should grant the petition, vacate the judgment, and remand to the Eighth Circuit for further consideration in light of *Discovery Network, Inc.*

Ladue, however, respectfully requests the Court to grant the petition, and order full briefing and argument on the merits. Remanding this case to the Eighth Circuit would probably only delay the eventual disposition of this case by this Court. The Eighth Circuit and other lower federal courts need direction as to the manner in which signs can be regulated consistent with the First Amendment.

Confusion reigns in the lower federal courts. Rather than balancing the First Amendment against the interests of federal, state, and local government to prevent the proliferation of signs, the Eighth Circuit and other federal courts are taking an absolutist approach to the First Amendment that is directly at odds with the jurisprudence of this Court. A definitive opinion from this Court is desperately needed to resolve the conflict among the lower courts.

This Court should also take the opportunity to address an additional issue in the instant case that has caused uncertainty among the lower courts. The issue involves the level of First Amendment scrutiny that should be applied to governmental regulation of private property.

The District Court erroneously held that speech on private property in a residential area is entitled to greater

protection than speech in a public forum. App. D at 29a-30a. The Eighth Circuit assumed "*arguendo* that the "secondary effects" doctrine extends to cases involving the prohibition of political signs on private property." App. A at 5a.

The Court has previously addressed this issue in *dictum*.[19] A definitive analysis of the issue is needed for the lower courts and the governmental entities who enact regulations of signs throughout the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition for a writ of certiorari should be granted, the Eighth Circuit's judgment should be vacated, and the case should be remanded to the United States Court of Appeals for the Eighth Circut for further consideration in light of *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, 113 S. Ct. 1505 (1993).

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[19] Justice Stevens wrote for the Court in *Vincent* that the esthetics interests are both "psychological and economic" and are "presumptively at work in all parts of the city." 453 U.S. at 552.

In his dissenting opinion in *Metromedia*, Justice Stevens emphasized the right of a city to prevent the visual blight caused by a proliferation of signs in residential as well as commercial parts of the city. "It seems to be accepted by all that a zoning regulation excluding billboards from residential neighborhoods is justified by the interest in maintaining pleasant surroundings and enhancing property values. . . . The character of the environment affects property values and the quality of life not only for the suburban resident but equally so for the individual who toils in a factory or invests his capital in industrial properties." 453 U.S. at 540, 552 (Stevens, J., dissenting in part).

In reviewing Ladue's sign ordinance, the Court should also be sensitive to Ladue's right to protect the privacy interests of its residents and the natural charm of its beautiful areas. *Cf. Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (Brandeis, J.) ("The radio can be turned off, but not so the billboard or street car placard."); *Vincent*, 466 U.S. at 806 (approval of "captive audience" theory).

Respectfully submitted,

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May 21, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 92-2232 and 92-2235

MARGARET P. GILLEO,
Plaintiff-Appellee,
v.

CITY OF LADUE; EDITH J. SPINK, Mayor of the City of Ladue; THOMAS R. REMINGTON, as member of the City Council of the City of Ladue; GEORGE L. HENSLEY, as member of the City Council of the City of Ladue; GALE S. JOHNSTON, JR., as member of the City Council of the City of Ladue; ROBERT A. WOOD, as member of the City Council of the City of Ladue; ROBERT D. MUDD, as member of the City Council of the City of Ladue; GEORGE FONYO, as member of the City Council of the City of Ladue,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: January 13, 1993

Filed: February 22, 1993

[As Amended on May 4, 1993]

Before MORRIS SHEPPARD ARNOLD, Circuit Judge, FLOYD R. GIBSON and REAVLEY,* Senior Circuit Judges.

REAVLEY, Circuit Judge.

The district court concluded that the City of Ladue's sign ordinance is unconstitutional and permanently enjoined Ladue from enforcing it. We affirm the court's injunction, but modify the court's award of attorneys' fees.

I. BACKGROUND

Ladue enacted an ordinance that prohibits most signs within the city (the ordinance).[1] Ladue City Ordinance Chapter 35. The ordinance enumerates specific exceptions to the general prohibition.[2] Ladue's stated reasons for its ordinances are: (1) to preserve the natural beauty of the community; (2) to protect the safety of residents; and (3) to maintain the value of real estate. Chapter 35, Article I ("Declaration of Findings, Policies, Interests, and Purposes").

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* The HONORABLE THOMAS M. REAVLEY, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

[1] The ordinance defines the term "sign" to include banners, pennants, insignia, bulletin boards, ground signs, billboards, poster billboards, illuminated signs, projecting signs, temporary signs, marquees, roof signs, yard signs, electric signs, wall signs, and window signs. According to Ladue's reply brief, the ordinance does not prohibit "rectangular or square shaped flags."

[2] The following signs are permitted: municipal signs; subdivision signs; residence identification signs; road signs and driveway signs for danger, direction, or identification; health inspection signs; church, religious institution, and school signs announcing names, services, activities, or functions (limited by number); identification signs for nonprofit organizations; signs identifying the location of public transportation stops; ground signs advertising the sale or rental of real property (one per property); commercial signs in districts zoned for commercial or industrial use (limited by number); and signs identifying safety hazards.

Margaret P. Gilleo placed an 11 x 8.5 inch sign stating "For Peace in the Gulf" in the front window of her home. Gilleo was informed that her sign violated Ladue's ordinance. She filed a complaint in federal district court asserting that the ordinance violates her First Amendment right to freedom of speech. Ladue filed a counterclaim for a declaratory judgment that its ordinance is constitutional. Both parties filed motions for summary judgment. The district court entered summary judgment in favor of Gilleo, declaring the ordinance unconstitutional. The court permanently enjoined Ladue from enforcing portions of its ordinance and awarded Gilleo $74,813.25 in attorneys' fees. On appeal, Ladue challenges both the injunction and the fee award.

II. Discussion

A. CONTENT-BASED RESTRICTIONS

Our method of analyzing the constitutionality of Ladue's ordinance depends on whether the ordinance is "content-neutral" or "content-based."

In classifying the ordinance as content-neutral or content-based, we are guided by the Supreme Court's plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981). San Diego, in an effort to improve both the safety and the appearance of the city, enacted an ordinance prohibiting billboards in the city. The billboard ordinance excepted on-site billboards identifying the owner or occupant of the premises or advertising goods or services available on the property. Additionally, the billboard ordinance excepted various types of noncommercial signs.[3] In holding San

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[3] The noncommercial signs excepted were: government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; "for sale" and "for lease" signs; signs on public

Diego's billboard ordinance unconstitutional, the plurality articulated two concerns. First, by permitting on-site commercial billboards but banning on-site noncommercial billboards, the billboard ordinance favored commercial speech over noncommercial speech. *Id.* at 513, 101 S. Ct. at 2895. Second, by excepting some types of noncommercial speech from the general ban, the city was improperly choosing the appropriate subjects for public debate. *Id.* at 514-15, 101 S. Ct. at 2896. The plurality identified San Diego's billboard ordinance as a content-based regulation.

Ladue's ordinance raises the same concerns. The ordinance favors commercial speech over noncommercial speech,[4] and it favors certain types of noncommercial speech over others. Following the plurality in *Metromedia*, we conclude that Ladue's ordinance is a "content-based" regulation.[5] *See National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991) (following *Metromedia*); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988) (same); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (same). However, because of the Supreme Court's writing since *Metromedia*, we should address

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and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs.

[4] For example, the ordinance permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts.

[5] We recognize that the ordinance is viewpoint neutral. But viewpoint neutrality does not render the statute content-neutral. *Burson v. Freeman*, ——U.S. ——, 112 S. Ct. 1846, 1850 (1992); *Boos v. Barry*, 485 U.S. 312, 319, 108 S. Ct. 1157, 1163 (1988). "The First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537, 100 S.Ct. 2326, 2333 (1980).

Ladue's argument concerning the "secondary effects" doctrine.

B. "SECONDARY EFFECTS" DOCTRINE

Under the secondary effects doctrine, a seemingly content-based regulation is analyzed as a content-neutral regulation if the government shows that the regulation is justified by a desire to eliminate a "secondary effect"—an undesirable effect unrelated to the content or communicative impact of the speech. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 929-30 (1986) (articulating a "secondary effects" test for distinguishing content-based from content-neutral regulations). As stated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989), "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ladue asserts that its ordinance is aimed only at preventing the adverse secondary effects caused by an overabundance of signs in the community. The secondary effects identified by Ladue include visual blight, unsafe conditions, and decreased property values.

Assuming *arguendo* that the "secondary effects" doctrine extends to cases involving the prohibition of political signs on private property,[6] Ladue fails at sufficiently supporting its secondary-effects argument. Specifically, Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs. Stated in other words, the prohibited signs are no more associated with the particular "secondary

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[6] We have some doubt as to Ladue's argument that the Supreme Court's adoption of the "secondary effects" doctrine has affected the precedential value of the Court's plurality decision in *Metromedia*.

effects" than many of the permitted signs.[7] *Compare Renton*, 475 U.S. at 51-53, 106 S. Ct. at 931-32 (ordinance was aimed at the particular secondary effects that surround theaters featuring sexually explicit films). Ladue has "singled out" certain categories of signs for discriminatory treatment. The fact that the ordinance's differential treatment does not correlate with Ladue's interest in eliminating the secondary effects undermines Ladue's commitment to its secondary-effects justification and supports the contention that the ordinance is aimed at the content of the signs. *Compare id.* (concluding that Renton had not "singled out" adult theaters for discriminatory treatment and that there was no evidence of under-inclusiveness). In short, the ordinance's sign exceptions, many of which cause the same secondary effects as the prohibited signs, renders the secondary effects doctrine inapposite to this case.

C. CONSTITUTIONALITY OF THE CONTENT-BASED RESTRICTION

Content-based restrictions are subject to strict scrutiny. To survive strict scrutiny, content-based restrictions must

[7] Ladue asserts that its ordinance prohibits signs that tend to proliferate. According to Ladue, the ordinance excepts from the general ban only signs that are naturally limited in number or that are necessary to protect the safety of Ladue's residents. Ladue, however, has failed to provide sufficient factual support for this proliferation rationale. For example, Ladue's proliferation rationale might explain why the ordinance limits the number of signs that a commercial business, a church, or a school may erect, but it does not explain why the ordinance additionally restricts the content of those signs. (Under the ordinance, commercial businesses may only erect a limited number of *commercial* signs, and schools and churches may only erect a limited amount of *announcement* signs.) *Cf. Metromedia*, 453 U.S. at 513, 101 S. Ct. at 2895 (noting that San Diego did "not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city").

be necessary to serve a compelling interest and must be narrowly drawn to achieve that end. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, —— U.S. ——, 112 S. Ct. 501, 509 (1991). While Ladue's interests in enacting its ordinance are substantial, *see Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07, 104 S. Ct. 2118, 2129-30 (1984), the interests are not sufficiently "compelling" to support a content-based restriction. With respect to the "narrowly-drawn" requirement, the content-based restriction must be the least restrictive alternative available. *See Ward*, 491 U.S. at 798 n.6, 109 S. Ct. at 2758 n.6. (explaining that the "narrowly-tailored" test differs according to whether the restriction is content-based or content-neutral). We have no trouble concluding that Ladue's ordinance is not the least restrictive alternative. Therefore, we affirm the district court's holding that Ladue's ordinance is unconstitutional.

We also conclude that the district court did not err in refusing to instate Ladue's back-up plan, which provides that all signs not specifically restricted by other parts of the ordinance must be no greater than six square feet. Neither side argued the constitutionality of such a plan to the district court.

D. ATTORNEYS' FEES

Pursuant to 42 U.S.C. § 1988, the district court awarded Gilleo $74,813.25 in attorneys' fees. The amount includes a 15% enhancement over the lodestar amount to compensate Gilleo's attorneys for taking the case on a contingency basis. In *City of Burlington v. Dague*, —— U.S. ——, 112 S. Ct. 2638, 2643-44 (1992), the Supreme Court held that enhancement for contingency is not permitted under certain fee-shifting statutes. Although *Dague* concerns the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act, the Court's analysis applies equally to § 1988. *See id.* at ——, 112

S. Ct. at 2641. We vacate the district court's 15% enhancement, thus reducing the fee award from $74,813.25 to $65,055.00.

III. CONCLUSION

Ladue's ordinance violates the First Amendment by favoring commercial speech over noncommercial speech and by favoring certain types of noncommercial speech over others. We affirm the district court's permanent injunction, and reduce the court's attorneys' fee award to $65,055.00.

AFFIRMED as MODIFIED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 92-2232 and 92-2235

MARGARET P. GILLEO,
Plaintiff-Appellee,

v.

CITY OF LADUE; EDITH J. SPINK, Mayor of the City of Ladue; THOMAS R. REMINGTON, as member of the City Council of the City of Laude; GEORGE L. HENSLEY, as member of the City Council of the City of Ladue; GALE S. JOHNSTON, JR., as member of the City Council of the City of Ladue; ROBERT A. WOOD, as member of the City Council of the City of Ladue; ROBERT D. MUDD, as member of the City Council of the City of Ladue; GEORGE FONYO, as member of the City Council of the City of Ladue,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Filed: April 8, 1993

After consideration of the application of plaintiff's counsel Green, Hoffmann and Dankenbring for attorneys'

fees and expenses, together with defendants objections, the court decides that the application should be granted with reduction of the hourly charges to accord with the award of the district judge, and it is therefore

Ordered that the appellants shall pay $31,500 for attorneys' fees and $2,566.86 for expenses incurred by counsel Green, Hoffman and Dankenbring during the appeal of this case.

A True

Attest Copy: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-2396C(7)

MARGARET P. GILLEO,
Plaintiff,

v.

CITY OF LADUE, *et al.*,
Defendants.

MEMORANDUM AND ORDER

[Filed Oct. 1, 1991]

This matter is before the Court on Plaintiff's motion for summary judgment and permanent injunction and on Defendant's motion for summary judgment.

On January 7, 1991, this Court entered an order granting Plaintiff's request for preliminary injunction, restraining Defendants from enforcing Chapter 35 (hereinafter Old Chapter 35), the City of Ladue's sign ordinance. On January 21, 1991, Defendants repealed Old Chapter 35 and enacted a new sign ordinance (hereinafter New Chapter 35).[1] Thereafter Plaintiff amended her complaint and now seeks summary judgment on her request for a permanent injunction against enforcement of New Chapter 35. Plaintiff retains many of the factual allegations relevant only to Old Chapter 35 in her pleading and memorandum in support of summary judgment. Defendants filed a counterclaim seeking a declaratory judgment that New

[1] New Chapter 35 was amended on February 25, 1991.

Chapter 35 is valid and enforceable under the Constitution. Defendants seek summary judgment on their counterclaim.

The Court ordered both parties to file memoranda relating to this Court's jurisdiction over the matter. Both parties filed documents before the Court stipulating that New Chapter 35 would not be enforced during the pendency of this suit. *See* Plaintiff's Second Amended Complaint ¶ 19; Defendants' Joint Answer to Plaintiff's Second Amended Complaint ¶ 19; Defendants' Amended Counterclaim ¶ 15. Subsequent to the Court's order for jurisdictional memoranda, Defendant City of Ladue amended its answer and notified all parties that New Chapter 35 would be enforced. *See* Defendants' Amendments by Interlineation filed April 22, 1991. Plaintiff filed a memorandum citing *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) and *United States Dept. of Agriculture v. FLRA*, 876 F.2d 50 (8th Cir. 1989). Both cases state that voluntary cessation of allegedly illegal conduct does not make a case moot. In *W.T. Grant Co.*, the Supreme Court stated that defendants would be free to return to their old ways if Courts dismissed as moot cases where the defendant voluntarily ceased the allegedly illegal conduct. *W.T. Grant*, 345 U.S. at 632. However, the Supreme Court noted that "the case may nevertheless be moot if defendant demonstrates there is no reasonable expectation that the wrong will be repeated." *Id.* at 633. Defendants repealed Old Chapter 35 and enacted a completely new chapter relating to sign regulation. While Plaintiff may contend New Chapter 35 suffers the same Constitutional infirmities as Old Chapter 35, Old Chapter 35 no longer exists. Thus, there is no reasonable expectation that the specific wrongs committed by the City of Ladue pursuant to Old Chapter 35 and found unconstitutional by this Court can be repeated in view of that chapter's repeal. Therefore, any arguments pertaining exclusively to Old Chapter 35 are moot.

This Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

A moving party always bears the burden of informing the Court of the basis of its motion. *Celotex Corp.*, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Id.* at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Id.* at 249.

The standard for determining whether a permanent injunction should issue is essentially the same as the standard for a preliminary injunction, with the exception that the Court determines the merits rather than Plaintiff's likelihood of success on the merits. *Current-Jacks Ford Canoe Rental Ass'n v. Clark*, 603 F.Supp. 421, 424-25 (E.D. Mo. 1985). The Court must also consider (1) whether the moving party will suffer irreparable injury

absent the injunction; (2) the injury to the moving party as balanced against the harm to the other party should the injunction issue; and (3) the effect on the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

New Chapter 35 generally prohibits all signs and billboards within Ladue. Article II, § 35-2.[2] New Chapter 35 provides for a limited number of exceptions to this general prohibition.[3] The new chapter adds a lengthy

[2] Section 35-2 states:

> No sign shall be erected, constructed, painted, placed, enlarged, maintained, changed or relocated except in conformity with the provisions of this chapter.

[3] Section 35-4 provides:

> Subject to the applicable regulations hereinafter described, the following types of signs are permitted in the City of Ladue:
>
> a) Municipal signs but said signs shall not be greater than nine (9) square feet.
>
> b) Subdivision and residence identification signs of a permanent character but said signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.
>
> c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.
>
> d) Health inspection signs but said signs shall not be greater than two (2) square feet.
>
> e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.
>
> f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.
>
> g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.
>
> h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.
>
> i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.
>
> j) Signs identifying safety hazards but said sign shall not be greater than twelve (12) square feet.

section in Article I entitled "Declaration of Findings, Policies, Interests, and Purposes." New Chapter 35 also includes § 35-24 providing for severability of parts of the chapter.

Defendants maintain that *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989) (represents a dramatic change in First Amendment jurisprudence although none of their memoranda prior to the preliminary injunction cite the case. (Defendants' Suggestions in Support p. 13). The regulation in *Ward* required performers to use sound-amplification equipment and a sound technician provided by the city when performing at the Bandshell, a public facility in New York City's Central Park. *Ward*, 109 S.Ct. at 2750. After the Court of Appeals reversed the District Court's decision that the regulation was a valid time, manner, and place regulation, the Supreme Court granted certiorari "to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech." *Id.*, at 2753. The Court recognized the Bandshell as a "public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment." *Id.* The Court noted that even in a public forum government may impose time, place, or manner restrictions if the restrictions (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication. *Id., quoting, Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Court stated that the principal inquiry in determining content-neutrality is whether the government has adopted a regulation of speech because of disagreement with the message. *Id.* at 2754. The *Ward* Court elaborated:

> Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'

Id., quoting Clark, 468 U.S. at 293.[4]

Article I of New Chapter 35 sets forth in detail the purposes of the ordinance. Ladue reiterates its interests in privacy, aesthetics, safety, and maintaining property values. The Article concludes:

> IT IS HEREBY DECLARED that the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination.

Art. I, New Chapter 35. While the declarations of purpose may list recognized government interests for regulation, the regulations themselves are explicit content-based exceptions to a general prohibition of signs. Unlike the regulation in *Ward* that sought only to regulate the volume of the protected speech, not the content or even the specific technical mix of the music,[5] New Chapter 35 specifically looks to the content to identify exceptions to a general prohibition of all signs. New Chapter 35 suffers the same infirmities as Old Chapter 35 in that it prefers some protected speech to other speech based on content. The City thus retains in New Chapter 35 the same basic regulatory scheme as contained in the now-repealed Old Chapter 35.

The general principles of law stated in the order of this Court granting Plaintiff's request for preliminary in-

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[4] *Ward* elaborates on the other two prongs of the test, but it is not necessary to reach those prongs in this decision.

[5] The majority in *Ward* noted

> Any governmental attempt to serve purely aesthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions.

Ward, 109 S.Ct. at 2754-55.

junction with respect to Old Chapter 35 apply as well to New Chapter 35. Pages 4-11 of the order of this Court filed January 7, 1991, as they relate to legal analysis and not to specific references to Old Chapter 35, are incorporated herein. For the reasons stated in this Order and in the Order of this Court filed January 7, 1991, New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited. . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the end of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10 are unconstitutional on their face. Having found the Plaintiff prevails on the merits and that Plaintiff will suffer irreparable harm absent the injunction and that the injunction is in the best interests of the public, this Court shall issue a permanent injunction.

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment seeking a declaration that New Chapter 35 is constitutional is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that an injunction issue restraining Defendants from enforcing New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited . . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the

end of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10.

Dated this 1st day of October, 1991

/s/ Jean C. Hamilton
JEAN C. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-2396-C-7

MARGARET P. GILLEO,
Plaintiff,

vs.

CITY OF LADUE, *et al.*,
Defendants.

ORDER NUNC PRO TUNC

[Filed Oct. 3, 1991]

IT IS HEREBY ORDERED nunc pro tunc that the phrase "although none of their memoranda prior to the preliminary injunction cite the case" is deleted from the first sentence of the first fuli paragraph of page 5 of the order of this Court filed October 1, 1991; and the sentence shall now read, "Defendants maintain that *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746 (1989) represents a dramatic change in First Amendment Jurisprudence."

Dated this 3rd day of October, 1991

/s/ Jean C. Hamilton
JEAN C. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-2396C(7)

MARGARET P. GILLEO,
Plaintiff,

v.

CITY OF LADUE, *et al.*,
Defendants.

ORDER

[Filed Oct. 1, 1991]

In accordance with the memorandum of this Court signed October 1, 1991, and incorporated herein,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment seeking a declaration that New Chapter 35 is constitutional is DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that an injunction issue restraining Defendants from enforcing New Chapter 35, Article II, Section 35-2; Section 35-4; Section 35-5 the first sentence only as it specifies identification signs; Section 35-5 the second sentence beginning with "shall be limited . . ." and ending with "other functions"; Section 35-5 the third sentence as it relates to limitations on announcements; Section 35-8(b) the first sentence beginning with "giving only the name . . ." and ending at the end

of the first sentence; Section 35-8(b) the words "and content" in the second sentence; and Section 35-10.

Dated this 1st day of October, 1991.

/s/ Jean C. Hamilton
JEAN C. HAMILTON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-2396-C-7

MARGARET P. GILLEO,

Plaintiff,

vs.

CITY OF LADUE; EDITH J. SPINK, MAYOR OF THE CITY OF LADUE; THOMAS R. REMINGTON, GEORGE L. HENSLEY, GALE S. JOHNSTON JR., ROBERT A. WOOD, ROBERT D. MUDD, GEORGE FONYO, AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF LADUE,

Defendants.

MEMORANDUM AND ORDER

[Filed Jan. 7, 1991]

This matter is before this Court on Plaintiff's motion for a preliminary injunction to prohibit the enforcement of Ladue City Ordinance 35, Articles I and II. Plaintiff brought this action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Ordinance 35.

On December 8, 1990, Margaret Gilleo (hereinafter Gilleo), a resident of the Willow Hill subdivision in Ladue, Missouri, placed a 24" x 36" sign in her front yard. The sign read, "Say No to War in the Persian Gulf, Call Congress Now." The sign disappeared from her yard, and Gilleo put up a second sign. This sign was taken down and thrown on the ground about ten feet from where it initially had been placed.

Having reported the apparent vandalism to the Ladue police, Gilleo went to the Ladue City Hall concerning the matter. When asked what the sign said, Gilleo stated its message and was then referred to the City Clerk. Although the Clerk was not present at City Hall, Gilleo was given a copy of Ordinance 35 (hereinafter the ordinance), an ordinance relating to the placement of signs within the City of Ladue.[1] The ordinance prohibited all signs except those specifically exempted from the prohibition.[2] The ordinance also permitted application for varia-

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[1] The ordinance defines "sign" as

> A name, word, letter, writing, identification, description, display model, special lighting arrangement, or illustration which is placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, person, institution, organization or place of business. The word "sign" shall also include "banners", "pennants", "insignia", "commercial signs", "bulletin boards", "ground signs", "poster billboards", and "electric signs", wherever placed.

[2] Section 35-3 provides: "No sign shall be erected, constructed, painted, placed, enlarged or relocated except in conformity with the provisions of this chapter nor until a permit has been issued; provided that the repainting of display matter shall not be deemed a change.

Section 35-6 provides:

> There shall be no commercial billboards in the city; and no person shall construct, erect, place, paint, display or maintain any sign for display or advertising by means of ground sign boards, free standing signs, roof sign boards, wall signs or bulletins, window signs, illuminated signs, or any other signs, whether or not of the classes herein listed, within the city, except as herein expressly authorized.
>
> The signs hereinafter authorized shall not include, and it shall be unlawful to maintain any sign which is moving, flashing or animated.

Section 35-2 provides exemptions from the general provision as follows:

tion from its provision.[a] After reading the ordinance, Gilleo returned to City Hall the following day and asked to see the Clerk. Because he was absent from City Hall, she was referred to the Chief of Police. He informed Gilleo that he lacked authority to grant variation from the sign ordinance and suggested she petition the City Council.

On December 17, 1990, Gilleo petitioned the City Council, requesting a permit for unnecessary hardship under § 35-5 of the ordinance. This was the first such request received for a variation from a resident concerning a sign in the resident's own yard. Other variation requests had related to commercial signs in commercially zoned areas of Ladue. The City Council, by a unanimous vote, denied Gilleo's request for a variation.

The following signs are exempted from the provisions of this chapter:

(a) All municipal signs.

(b) Subdivision identification signs of a permanent character and road signs for danger, direction or identification.

(c) Signs not exceeding one (1) square foot of display surface on a residence building stating only the name and profession of an occupant.

(d) Health inspection signs.

(e) Real estate signs authorized by section 35-12. (Ord. No. 812; § 16, 1-21-63)

Section 35-12 permitting "for sale" signs states in pertinent part: "It shall be permissible for the owner or authorized agent of premises to erect a ground sign advertising the sale or rental of the premises upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, shall contain no other advertising matter and shall be not more than two (2) feet in height by three (3) feet in length.

[a] Section 35-5 provides for variation of the chapter provisions: "The council may grant a permit required by this chapter and permit a variation in the strict application of the provisions and requirements of this chapter where there are practical difficulties or unnecessary hardships, or where the public interest will be best served by permitting such variations."

On December 21, 1990, Gilleo filed a Motion for Temporary Restraining Order and Preliminary Injunction, challenging the ordinance as violative of the First Amendment of the Constitution. Plaintiff's motion for a temporary restraining order was denied. This Court held a hearing on the motion for preliminary injunction on December 26, 1990.

Before issuing an injunction this Court must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and any injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

The statutory framework for sign regulation in Ladue establishes a general prohibition against signs. §§ 35-3; 35-6. It then enumerates specific exemptions to that prohibition. Political signs or issue-related signs, such as Gilleo's, fall under the general prohibition. Various exemptions, however, specifically allow "for sale" and "for rent" signs; subdivision identification signs; certain road signs; municipal signs; residence identification signs; and health inspection signs. §§ 35-2; 35-12. The issue before this Court is whether the ordinance abridges Plaintiff's freedom of speech.

Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). However, signs, like billboards, combine communicative and noncommunicative aspects, and government has a legitimate interest in regulating noncommunicatice aspects. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Regulations concerning the time, place, and manner of speech are permissible if they advance a significant government interest, if they are

justified without reference to the content, and if they leave open alternative means of communicating the information. *Id.* at 516.

In *Metromedia, Inc. v. City of San Diego,* the Supreme Court considered whether a city government could limit on-site billboards to those containing commercial messages related to the on-site business, thus effectively prohibiting noncommercial speech.[4] The Court recognized that noncommercial speech is accorded greater protection under the First Amendment than is commercial speech. *Id.* at 513. With regard to the city ordinance provisions that permitted commercial billboards but prohibited noncommercial billboards, the Court observed that

> [t]he city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Id.

In addition, because, under the ordinance's exemptions to its general ban on signs containing noncommercial advertising, some noncommercial messages might be conveyed on billboards throughout commercial or industrial zones, San Diego was impermissibly choosing "the appropriate subjects for public discourse. . . ." *Id.* at 515. Thus, by permitting exceptions to the general ban con-

[4] The Court also addressed whether the city could prohibit all off-site commercial billboards. The Court held that the city could prohibit all off-site commercial billboards while permitting on-site billboards. *Metromedia,* 453 U.S. at 512.

tained in the ordinance, San Diego had necessarily conceded that some communicative interests were stronger than its competing interests in aesthetics and traffic safety. *Id.* at 520. In finding the San Diego ordinance unconstitutional on its face, the Court cautioned that it was the general prohibition that created the infringement on freedom of speech, not the exception. *Id.* at 520-521.

The First Circuit Court of Appeals followed *Metromedia in Matthews v. Town of Needham,* 764 F.2d 58 (1st Cir. 1985). Town residents challenged the validity of town bylaws barring the posting of political signs on residential property. Signs expressly permitted included those denoting the name and/or profession of the owner or occupant of the building, temporary signs erected for a charitable cause, temporary signs relating to the sale, rental or lease of the premises or stating the name and address of the parties involved in construction on the premises, and one bulletin board for and on the premises of a public, charitable, or religious institution. *Matthews,* 764 F.2d at 59. The *Matthews* court held that the bylaw discriminated on the basis of content, in that it permitted sale, rental, and lease signs, professional office signs, contractors' advertisements, and signs for charitable or religious causes, but it prohibited political signs in all districts of the town. *Id.* at 60. The court recognized that, by giving more protection to commercial speech than to noncommercial speech, the bylaw inverted a well-established constitutional principle. *Id.* at 61. It therefore affirmed the lower court's finding that, because the bylaw violated the first amendment guarantee of freedom of speech, it was unconstitutional on its face.[5]

[5] Plaintiffs also rely on *Meros v. City of Euclid,* 594 F.Supp. 259 (N.D. Ohio 1984), *vacated,* 780 F.2d 1020 (6th Cir. 1985). The Sixth Circuit Court of Appeals vacated the decision as moot because the Ohio Court of Appeals in *City of Euclid v. Mabel,* 19 Ohio App.3d 235, 484 N.E.2d 249 (Ohio Ct. App. 1984) declared the ordinance unconstitutional. The ordinance prohibited political

In the case at bar, the Ladue ordinance exhibits the same constitutional defect discussed in the *Metromedia* and *Matthews* opinions. The ordinance bans all signs not expressly authorized. §§ 35-3; 35-6. Necessarily included in this prohibition is a ban on all noncommercial speech and, specifically, on political or issue-related signs such as Plaintiff seeks to erect in her yard. This clearly infringes freedom of speech. *See, e.g., Metromedia,* 453 U.S. at 520.

Moreover, a consideration of the exemptions to the general prohibition of the ordinance confirms that the infringement rises to the level of a constitutional violation. First, by permitting commercial signs, that is "for sale" or "for rent" signs, the City has impermissibly concluded that the communication of commercial information is of greater value than the communication of noncommercial messages. Secondly, the ordinance does exempt certain signs bearing noncommercial messages such as municipal signs, subdivision identification signs, residence identification signs, certain road signs and health inspection signs. This content selectivity with respect to noncommercial speech, however, allows the City to determine "which issues are worth discussing or debating . . . ." *Mosely,* 408 U.S. at 96. Such action by a government contravenes the First Amendment for "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 530, 538 (1980). Thus, the exemptions from the ordinance, which attempt to regulate signs in the City, lack content-neutrality and thereby render the ordinance unconstitutional on its face.

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lawn signs but allowed "for sale" and "for rent" signs. The state court of appeals concluded it was unconstitutional under either a facial analysis or a competing interests analysis.

Defendants assert they have a right under their police power to prohibit lawn signs to protect the privacy, safety, and aesthetic interests of Ladue. Defendants urge this Court to follow the decisions in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) and *Greer v. Spock,* 424 U.S. 828 (1976). Both cases are distinguishable, however, in that they involved public fora and specific government-created environments such as public transit vehicles and military bases. *See Metromedia,* 453 U.S. 514, n. 19.

Defendants further contend that the ordinance is both content and viewpoint neutral and that its general prohibition against signs with specified exceptions is justified by privacy, safety, and aesthetic interests. An ordinance that completely bans all political speech but that permits certain forms of commercial speech is not, however, content-neutral. *See Metromedia,* 453 U.S. at 516-17. Therefore, an analysis for a time, place, and manner restriction is both unnecessary and inappropriate.

Defendants also assert that their interests in privacy, safety, and aesthetics are compelling interests that would allow the ordinance to withstand constitutional scrutiny under the test announced in *Boos v. Barry,* 108 S.Ct. 1157, 1164-68 (1988). *Boos,* however, dealt with content-based regulation of political speech in a *public forum,* not with a resident attempting to exercise free speech in her own yard in a residential area.[6]

Similarly, the cases cited by Defendants to assert a "communal" privacy interest of the residents of Ladue are inapposite. Defendants cite *Carey v. Brown,* 447 U.S. 455, 470-71 (1980); *Rowan v. United States Post*

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[6] In *Boos* the Court said that content-based restrictions on political speech in a public forum must be subjected to exacting scrutiny. The government must show that the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos,* 108 S.Ct. at 1164 (*quoting Perry Education Assn. v. Perry Local Educators Assn.,* 460 U.S. 37, 45 (1983)).

Office Department, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Pursley v. City of Fayetteville, Arkansas*, 820 F.2d 951, 955-56 (8th Cir. 1987). Each recognizes the state's interest in protecting the privacy interests and domestic tranquility of the individual property owner from outside interruptions. None imposes restrictions on an individual property owner as is the case with the Ladue sign ordinance.

In *Rowan v. United States Post Office Department*, the Supreme Court upheld the portion of the Postal Revenue and Federal Salary Act that allowed an addressee to request the post office to order the sender of unwanted "erotically arousing or sexually provocative" material to refrain from further mailings to the addressee. *Rowan*, 397 U.S. at 730. The Court noted that Congress provided sweeping power to the individual addressee to avoid vesting the power to make any discretionary evaluation of the material in a governmental official. *Id.* at 737. Thus, the challenged statute in *Rowan* avoided placing content-based discretion in the hands of the statute drafters or those charged with enforcement.

Unlike the present case, *Kovacs v. Cooper*, *Carey v. Brown*, and *Pursley v. City of Fayetteville, Arkansas*, all involve regulation of public fora. In *Kovacs*, the Court, recognizing the state's interest in protecting privacy, upheld an ordinance banning loud speakers and amplifiers on trucks on public streets. The Court balanced the need for reasonable protection in the home against the intrusive nature of the distracting noise of vehicles equipped with sound devices. *Kovacs*, 336 U.S. at 89. The Court also noted that this was not a total ban on all sound trucks because they were still allowed in other traditional public fora such as parks or other open places. *Id.* at 85. In both *Carey v. Brown* and *Pursley v. City of Fayetteville, Arkansas*, the courts found the challenged ordinances unconstitutional while recognizing government's interest in protecting privacy. Both involved ordinances barring picketing. In *Carey*, the Supreme Court held unconstitutional a state statute that generally banned picketing but exempted labor picketing. The Court determined that because the statute discriminated on the basis of the subject matter or content of the expression, it did not advance a legitimate objective, privacy, in a manner consistent with the Equal Protection Clause. *Carey*, 447 U.S. at 471. Finally, in *Pursley*, the Eighth Circuit Court of Appeals struck down a general ban on picketing in front of residences. The court recognized a reasonable time, place, and manner regulation might be appropriate to protect privacy and the sanctity of the home. *Pursley*, 820 F.2d at 955. The court found, however, that this absolute ban was not narrowly tailored and was void for overbreadth. *Id.* at 956, 957. While privacy, safety, and aesthetic interests are recognized justifications for content-neutral restrictions, the Ladue ordinance in question is not content-neutral. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

Because Ordinance 35 impermissibly places greater value upon commercial than noncommercial speech and impermissibly values the content of certain noncommercial speech over that of other noncommercial speech, it is unconstitutional on its face.

It appears to the Court that the continued enforcement of Ladue Ordinance 35 will irreparably harm Plaintiff. Similarly, it appears that Plaintiff will ultimately be entitled to a judgment declaring the ordinance unconstitutional on its face. The Court concludes that the Defendants should be enjoined preliminarily from enforcing Ordinance 35.

Therefore, IT IS ORDERED that an injunction issue, without security therefor.

Dated this 7th day of January, 1991.

/s/ Jean C. Hamilton
JEAN C. HAMILTON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 90-2396C(7)

MARGARET P. GILLEO,
Plaintiff,

v.

CITY OF LADUE, *et al.*,
Defendants.

ORDER

[Filed Apr. 30, 1992]

This matter is before the Court on the application of Plaintiff's counsel, Green, Hoffmann & Dankenbring, for attorney's fees and expenses.

District Courts may award reasonable attorney's fees to prevailing parties in litigation to enforce a provision of section 1983. 42 U.S.C. § 1988. A prevailing party should ordinarily recover an attorney's fee unless special circumstances makes such an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The starting point or lodestar figure for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 433. Where an attorney has obtained the results his client sought, the attorney should recover a fully compensatory fee. *Id.* at 435. A district court should consider twelve factors in determining attorney's fees: (1)

the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of time involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). Enhancement may be warranted in exceptional cases. *Hensley*, 461 U.S. at 435.

Plaintiff seeks attorney's fees at a complex litigation rate and a 50% enhancement. This case involved one legal issue and does not reasonably warrant a complex litigation rate. Attorney's fees will be calculated at the standard rate. Plaintiff's attorneys submitted affidavits and records demonstrating that they spent 422.75 hours representing Plaintiff in this case. The Court finds the number of hours to be reasonable. The attorney's fee lodestar figure is calculated as follows:

Attorney	Standard Rate	X	Hours	=	Total
M. Margo	$150		246.75		$37,012.50
G. Greiman	150		61.25		9,187.50
M. Green	180		84.75		15,255.00
H. Iveson	120		30.00		3,600.00
					$65,055.00

Plaintiff has the burden of justifying her entitlement to an enhancement for the contingent nature of the litigation. *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991). Plaintiff has submitted the affidavit of her own attorney and two other attorneys in the community. She has adequately established that the relevant market compensates for contingency cases as a class and that she would have faced difficulties in finding

counsel in the local market without the promise of adjustment for risk. (Affidavits of D. Harlan and M. Silverstein). While the Court finds that the affidavits establish an entitlement to enhancement under the Eighth Circuit's decision in *Morris v. American Nat'l Can Corp.*, the Court finds that a 50% enhancement in light of the circumstances of this case is unreasonable. An enhancement of 15% for the risk inherent in a contingency case of this nature is adequate and reasonable.

IT IS HEREBY ORDERED that the application of Plaintiff's counsel, Green, Hoffmann & Dankenbring, for attorney's fees and expenses is GRANTED.

IT IS FURTHER ORDERED that Plaintiff Margaret Gilleo recover of defendants $74,813.25 for attorney's fees and $4,099.00 for costs.

Dated this 30th day of April, 1992.

/s/ Jean C. Hamilton
JEAN C. HAMILTON
United States District Judge

APPENDIX F

Chapter 35

SIGNS

ARTICLE I. DECLARATION OF FINDINGS, POLICIES, INTERESTS, AND PURPOSES

WHEREAS the City of Ladue, formed in 1936, has a unique heritage and was created as a specially planned community based upon the work of the renowned city planner, Harland Bartholomew;

WHEREAS the City of Ladue is predominantly a residential community, small portions of which have been zoned for commercial and industrial use;

WHEREAS the City of Ladue consists of 5,456 acres or 8.566 square miles, of which a total of approximately 84% or 5,283 acres is in residential use (including 700 acres of public and private roads), approximately 13.9% or 721 acres is in public or semi-public use such as schools, public parks, and religious institutions, approximately 1% or 51 acres is in commercial use, and approximately 2% or 102 acres is in industrial use;

WHEREAS the protection and preservation of the rights and values of privacy, aesthetics, and safety are of great importance to the residents of the City of Ladue and substantially contribute to the special ambience, quality of life, and general welfare of the community;

WHEREAS the private, residential, commercial, industrial, and public areas of the City of Ladue should be

maintained in a manner to foster the values of privacy, aesthetics, and safety; and

WHEREAS the property value in the City of Ladue and the general welfare of its residents are enhanced by the maintenance of the highest standards of privacy, aesthetics, and safety for the benefit of all its residents;

IT IS HEREBY DECLARED that the erection and placement of signs should be carefully regulated so that the signs do not substantially impinge upon the privacy, aesthetics, and safety interests of the community;

IT IS HEREBY DECLARED that the proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children;

IT IS HEREBY DECLARED that the City of Ladue wishes to allow speech and expression through the medium of signs so long as the City of Ladue is protected against the proliferation of an unlimited number of signs that substantially impinge upon the City of Ladue's interests in privacy, aesthetics, and safety;

IT IS HEREBY DECLARED that the time, place, and manner of the regulation of signs described in this chapter are necessary to protect and preserve the City of Ladue's interest in privacy, aesthetics, safety and property values;

IT IS HEREBY DECLARED that the residents of the City of Ladue have numerous alternative and effective ways of expressing themselves other than through the medium of signs;

IT IS HEREBY DECLARED that the City of Ladue takes notice of R.S.Mo. § 67.317 (1986), which requires

political subdivisions of Missouri to allow "for sale" and "for lease" signs;

IT IS HEREBY DECLARED that there is a limited number of "for sale" and "for lease" signs in the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of commercial establishments in the commercial areas of the City of Ladue at any given time;

IT IS HEREBY DECLARED that there is a limited number of municipal signs, subdivision identification signs of a permanent character, road signs and driveway signs for danger, direction, or identification, health inspection signs, signs for churches, religious institutions, and schools, signs identifying public transportation stops, and signs identifying safety hazards in the City of Ladue at any given time;

IT IS HEREBY DECLARED that residence identification signs (i) assist emergency and safety personnel in providing fire, police, ambulance, and other emergency services to the public; and (ii) are small in size and are placed frequently on existing structures such as the mailbox or front wall of the principal structure. Therefore, residence identifications signs contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that road signs and driveway signs for danger, direction, or identification and signs identifying safety hazards contribute materially to the public safety and welfare and do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, and maintenance of property values so as to necessitate a total ban on said signs;

IT IS HEREBY DECLARED that the allowance of all commercial and non-commercial signs in the residential, commercial, and industrial areas of the City of Ladue, other than those specifically permitted by this chapter, would permit the proliferation of signs in a manner that would substantially impinge upon the privacy, aesthetic and, to some extent, the safety interests of the City of Ladue and impair property values because of the unlimited number of signs that thereby could be erected throughout the City of Ladue;

IT IS HEREBY DECLARED that the signs permitted in this chapter either contribute substantially to the public safety and welfare or, because of their limited number, location, and size, do not substantially impinge upon the City of Ladue's interest in privacy, aesthetics, safety, and maintenance of property values so as to necessitate a total ban of all signs; and

IT IS HEREBY DECLARED that the City of Ladue opposes discrimination based upon the content of any lawful speech or expression and that the provisions of this chapter are not intended and shall not be interpreted so as to permit any such discrimination.

ARTICLE II. IN GENERAL

Sec. 35-1. Definitions.

For the purpose of this chapter, the following terms and words shall have the meanings respectively ascribed to them:

Area of signs. The entire area within a single continuous perimeter enclosing the extreme limits of such sign, except "wall signs." Such perimeter shall not include any border or structural elements lying outside and not forming an integral part of the display. The area of a wall sign shall be the height of the tallest letter or display item multiplied by the length of the sign.

Erect shall mean to build, construct, attach, hang, place, suspend, or affix, and shall also include the painting of wall signs.

Ground signs shall include any sign supported by upright or braces placed upon the ground, and not attached to any building.

Marquee. Marquee shall include any hood or awning of permanent construction projecting from the wall of a building above an entrance and extending over a thoroughfare.

Office building. A building in which any of the occupants use the space occupied therein primarily for purposes of offices.

Person shall mean and include any person, firm, partnership, association, corporation, company, institution, and organization of any kind.

Sign. A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletin boards", "ground signs", "billboards", "poster billboards", "illuminated signs", "projecting signs", "temporary signs", "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

Wall signs. Any sign erected, painted on or constructed into and as a part of the wall or exterior of a structure and not extending out from or above the wall or exterior of such structure, but forming an integral part of the

surface of such wall or exterior thereof provided that such sign may extend above the wall where there is a wall or roof structure behind all of such extension.

Window signs. Any sign erected, attached to the outside or inside of a window, or placed immediately inside o fa window for public display purposes to persons on the outside of such building or structure. (Ord. No. 812, § 2, 1-21-63; Ord. No. 929, § 1, 10-16-67; Ord. No. 1387, § 1, 2-10-86)

Sec. 35-2. Signs restricted within the City.

No sign shall be erected, constructed, painted, placed, enlarged, maintained, changed or relocated except in conformity with the provisions of this chapter.

Sec. 35-3. Removal of nonconforming signs.

Any sign which is not erected, constructed, or maintained in accordance with the provisions of this chapter may be removed by the City and the cost thereof charged to the owner of, or person maintaining, such sign. (Ord. No. 812, § 15, 1-21-63)

Sec. 35-4. Limited number and size of signs permitted.

Subject to the applicable regulations herein after described, the following types of signs are permitted in the City of Ladue:

a) Municipal signs but said signs shall not be greater than nine (9) square fee.

b) Subdivision and residence identification signs of a permanent character but said subdivision identification signs shall not be greater than six (6) square feet and said residence identification signs shall not be greater than one (1) square foot.

c) Road signs and driveway signs for danger, direction, or identification but said signs shall not be greater than twelve (12) square feet.

d) Health inspection signs but said signs shall not be greater than two (2) square feet.

e) Signs for churches, religious institutions, and schools subject to the restrictions described in Sec. 35-5.

f) Identification signs for not-for-profit organizations not otherwise described herein but said signs shall not be greater than sixteen (16) square feet.

g) Signs identifying the location of public transportation stops but said signs shall not be greater than three (3) square feet.

h) Ground signs advertising the sale or rental of real property subject to the restrictions described in Sec. 35-10.

i) Commercial signs in commercially zoned or industrial zoned districts subject to the restrictions as to size, location, and time of placement hereinafter described.

j) Signs identifying safety hazards but said signs shall not be greater than twelve (12) square feet.

Sec. 35-5. Signs for churches, religious institutions, and schools.

Any church, religious institution, or school located in the city shall be permitted to erect one (1) identification sign and one (1) wall bulletin or one (1) ground sign, none of which shall be more than sixteen (16) square feet in area, when located on the premises occupied by such church, religious institution, or school. Such sign shall be limited to announcements relating to the name of such church, religious institution, or school, its services, activities or other functions, and shall be located so that it does not interfere with a motor vehicle driver's view of the public roads or of the driveway leading into or out of such church, religious institution, or school premises.

In addition, a church, religious institution, or school may erect a temporary sign during a continuous period of not

more than sixty (60) days, subject to the same limitations as to area and announcements. (Ord. No. 812, § 8, 1-21-63)

Sec. 35-6. Signs at filling stations.

In lieu of the signs authorized by other sections of this chapter, gasoline filling stations may erect one banjo type ground sign having an area of not more than twenty-five (25) square feet on each side (except where located on Lindbergh Boulevard, in which event such area shall not exceed sixty (60) square feet on each side) placed no closer to a street than the nearest edge of the road right-of-way, and having a ground clearance not less than twelve (12) feet at the bottom edge thereof, nor more than twenty-two (22) feet at the top edge thereof.

In addition, such filling stations may erect two (2) free standing signs of not more than twelve (12) square feet each, whose height aboveground at the top edge thereof shall not exceed four (4) feet; and three (3) building or window signs each having maximum dimensions of not more than two (2) feet in height, with a length not to exceed six (6) feet, and having a combined total area for the three (3) signs of not more than sixty (60) square feet; provided that where such filling station is located on a corner lot it may have four (4) such building or window signs. (Ord. No. 812, § 4, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-7. Signs for buildings other than filling stations, churches, religious institutions, and schools.

a) A building, other than gasoline filling station, church, religious institution, or school which is located on less than three (3) acres of ground and is occupied by a single separately owned and operated commercial or industrial establishment may have one sign attached to such building. Such sign shall be limited to twelve (12) square feet and shall not extend above the wall height of such building unless located on top of the building. In

lieu of such sign, if the building is set back further than the front setback line for structures in the applicable zoning district, a free standing sign having an area of not more than fifty (50) square feet or one (1) percent of the ground floor area of such building, whichever is smaller but not less than ten (10) square feet, may be erected on such building line.

b) A building located on three (3) acres or more of ground, which is occupied as set forth on paragraph a) of this section, and which covers not more than forty (40) per cent of the area of the tract of ground upon which it is located, may have a sign as provided in said paragraph a) with an area of not more than two hundred sixty (260) square feet; and where such sign is placed on a building located on Lindbergh Boulevard there is permitted in addition thereto a free standing sign having an area of not more than one hundred twenty-five (125) square feet, located anywhere within the property lines of the premises.

c) In addition to the signs permitted by paragraphs a) and b) of this section, such establishments may have one (1) window sign with an area of two (2) square feet for each ten (10) linear feet of window frontage on the street where displayed, but may have two (2) such signs in any event.

d) When such building is located on a lot bordered by two (2) or more streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a), b), and c) of this section shall be permitted on two (2) of such travelled areas. (Ord. No. 812, § 6, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-8. Signs for office buildings.

A building which is occuped to any extent as an office building or to any extent as an arcade building with busi-

ness establishments not fronting on a public street may have the following signs, to wit:

a) Each commercial and industrial establishment occupying any portion of the ground floor of such bulding and facing a public street may have the signs permitted by Sec. 35-9.

b) The occupants using a portion of the building for offices and those occupants having business establishments not fronting on a public street may have one (1) sign for all such occupants giving only the name and address of the building, and the name and one business of each of said occupants. The area of such sign shall not exceed sixteen (16) square feet, and it shall be located on the wall of such building adjacent to the entrance thereto, or it may be a ground sign similarly limited as to area and content, located adjacent to or near the front property line of the premises. (Ord. No. 812, § 5, 1-21-63; Ord. No. 929, § 1, 10-16-67)

Sec. 35.9. Signs for buildings other than office or arcade.

a) A building other than an office or arcade building which is occupied by more than one industrial or commercial establishment, may have one (1) sign attached to such building for each such occupant facing a public street. All such signs shall be limited to twelve (12) square feet and shall not extend above the wall height of the building except when located on top of the building; and no sign shall extend out over either end of the building.

b) In addition to the sign permitted by paragraph a) of this section each of said separate business establishments may have the window signs that are authorized by paragraph c) of Sec. 35-7.

c) When the portion of the building occupied by such establishment is located on a corner of two (2) intersecting streets, or at the intersection of a street and an area used by the public for vehicular traffic, the signs permitted by paragraphs a) and b) of this section shall be permitted on each of such intersecting traveled areas. (Ord. No. 812, § 7, 1-21-63; Ord. No. 1197, § 1, 4-17-78)

Sec. 35-10. For sale and for lease signs.

It shall be permissible for the owner or authorized agent of an owner with an interest in real property to erect a single ground sign advertising the sale or rental of the real property upon which it is maintained; but such sign shall not be attached to any tree, fence or utility pole, and shall be not greater than six (6) square feet. Such sign may only state: (a) that the property is for sale, lease or exchange by the owner or his agent; (b) the owner's or agent's names; and (c) the owner's or agent's address or telephone number.

Sec. 35-11. Illuminated, moving, flashing, or animated signs.

No one shall install or maintain more than one illuminated sign among the signs permitted by this chapter, and no sign shall be illuminated otherwise than by electricity. All illuminated signs shall be construed entirely of metal or other incombustible materials, except the insulation thereof, including the uprights, supports and braces for the same, and if on a building shall be properly and firmly atttached to the building and constructed so as not be or become dangerous. The illumination provided shall be limited to the minimum amount necessary to allow the text or the sign to be read. Such sign shall be illuminated only during the business hours of the sign user.

It shall be unlawful to install, construct, place, display, or continue to maintain any sign which is moving, flashing, or animated.

Sec. 35-12. Roof signs.

Every roof sign shall be constructed entirely of steel construction, including the upright supports and braces of the same, and must be so constructed as to withstand a wind pressure of not less than thirty (30) pounds to the square foot of area subject to such pressure. When a roof sign is erected on a building which is not constructed entirely of fireproof materials, the bearing plates of said sign shall bear directly upon the masonry, walls, or upon the steel girders which are supported on the masonry walls and intermediate columns of such building. All roof signs shall be thoroughly secured to the building upon which they are installed by iron or metal anchors, bolts, supports, chains, stranded cables, steel rods, or braces. (Ord. No. 812, § 11, 1-21-63)

Sec. 35-13. Free standing, ground signs.

No free standing or ground sign (other than banjo signs of gasoline filing stations) shall be at any point more than fifteen (15) feet above the ground level, and every such sign shall have an open space of not less than two (2) feet between the lower edge of such sign and the ground level. All ground signs shall be designated and constructed so as to be safe from falling and to withstand wind pressures of not less than thirty (30) pounds to the square foot of area subject to such pressure. (Ord. No. 812, § 12, 1-21-63)

Sec. 35-14. Permit Required.

No sign permitted under Sections 35-6, 35-7, 35-8, 35-9, 35-11 and 35-12 shall be erected, constructed, painted or placed upon any building or premises within the City until a permit therefore has been issued by the City Clerk. (Ord. No. 812, § 13, 1-21-63

Sec. 35-15. Application.

No sign permit shall be issued until after an application therefor has been filed with the City Clerk accompanied

by duplicate scale or dimensional drawings showing the plans and specifications, dimensions, the material of which said sign is to be constructed, the details of construction thereof, including loads, stresses, and anchorage, the estimated cost thereof, and in the case of ground signs the proposed location with reference to street lines and the walls of adjacent buildings, if any. When a proposed sign is to be attached to a building or other independent structure, the drawings shall show the position of the sign on the supporting structure, the method of attachment to such structure and the character of the structural member to which such attachment is made. It shall be the duty of the Building Commissioner to review said plans and specifications and make written report to the City Clerk within fifteen (15) business days after filing of a permit application, as to compliance with the provisions of this Section.

All applications for permits to erect signs shall be filed by the owner of the premises, or shall be accompanied by written consent of such owner, the lessee, or agent of the property upon which said sign is to be erected. (Ord. No. 812, § 13, 1-21-63)

Sec. 35-16. Issuance.

Within thirty (30) days after the filing of a permit application that conforms to the provisions of Section 35-15, the City Clerk shall issue a permit upon determining that the provisions of this Chapter have been complied with, including approval by the Building Commissioner of the plans and specifications in compliance herewith. An application for a permit shall be deemed granted if the Building Commissioner does not file his report and the City Clerk does not issue a written denial within thirty (30) days after the filing of such permit application.

Sec. 35-17. Appeal upon denial.

Any person who believes that he has been improperly denied a permit for a sign that conforms to the require-

ments of this Chapter may appeal to the City Council for a permit. Within sixty (60) days after the filing of an appeal, the City Council shall issue a permit upon determining that all the provisions of this Chapter have been complied with. A permit shall be deemed granted if the City Council does not issue a written denial within sixty (60) days after the filing of such appeal.

Sec. 35-18. Prevention of corrosion.

All signs which are not galvanized or constructed of approved corrosion-resistive, noncombustible materials shall be painted whenever necessary to prevent corrosion. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-19. Maintenance of premises near sign.

It shall be the duty and responsibility of the owner of, or person maintaining, a sign to maintain the immediate premises occupied by the sign in a clean, sanitary and healthful condition. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-20. Inspection of signs.

All signs may be inspected by the Building Commissioner or someone appointed by him to determine if the sign is insecure, in danger of falling, or otherwise unsafe.

Sec. 35-21. Notice to remove unsafe sign.

When any sign becomes insecure, in danger of falling, or otherwise unsafe, or if any sign exists or is installed or maintained in violation of the provisions of this chapter with respect to construction or safety, the owner, person or firm maintaining such sign shall correct the deficiencies or violation or remove the sign within ten (10) days after receiving notice from the City Clerk; provided, however, that if such sign constitutes an immediate danger to the public health, safety or welfare, the Building Commissioner shall order immediate correction or removal of such sign. (Ord. No. 812, § 14, 1-21-63)

Sec. 35-22. Limited variation of chapter provisions.

The City Council may grant a limited variation from the strict application of the provisions and requirements of this chapter, but such variation may only be granted as to the size or location of a sign or the number of signs permitted on a person's property, and only if the Council determines that the variation in the particular circumstances is consistent with the policies, interests, and purposes stated in Article I of this ordinance. When considering a request for a variation, the Council shall not consider the content of any sign, and shall not depart from the strict requirements of this chapter in any respect other than those specifically permitted by this section.

Sec. 35-23. Application to existing signs.

The provisions of this chapter shall apply to the erection, alteration, reconstruction, construction, and maintenance of all signs within the city; however, all existing signs that have previously been allowed by ordinance or approved by permit shall be permitted.

Sec. 35-24. Severability of parts of this chapter.

The sections, paragraphs, clauses, and phrases of this chapter are severable and if any phrase, clause, sentence, paragraph, or section of this chapter shall be declared unconstitutional or otherwise unlawful by the valid judgment, decree, or injunction order of a court of competent jurisdiction, such ruling shall not affect any of the remaining phrases, clauses, sentences, paragraphs, and sections of this chapter. In the event that, contrary to the policies, interests, and values of the City of Ladue, a court of competent jurisdiction issues a judgment, decree, or injunction order that this chapter is unconstitutional or otherwise unlawful because of any omission or prohibition in this chapter, then all provisions of this chapter not specifically declared to be unconstitutional or otherwise unlawful shall remain in full force and effect and

all signs not already specifically regulated in Sections 35-4 to 35-23 shall be permitted but shall not be greater than six (6) square feet. In the event that a judgment, decree, or injunction order declaring all or a portion of this chapter to be unconstitutional or otherwise unlawful is reversed or vacated by a court of competent jurisdiction, the provisions contained in this chapter shall remain in full force and effect.